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# Positive Obligations in Human Rights Law: the disabilities paradigm shift

Danai Angeli

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

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European University Institute  
**Department of Law**

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This thesis has been submitted for Language correction.

## **Abstract**

In light of the doctrinal innovations of the latest thematic treaty, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), the present thesis revisits the concept of positive obligations in human rights law. Having as a main point of reference the vision of the human being upon which human rights law is based, the thesis suggests a new approach towards conceptualising and analysing positive obligations, namely in terms of human interactions. Under this revised schema, positive obligations ought to be defined as calls for assistance to enable the individual to reach a minimum threshold of both material welfare and sociability. In addition, upon assuming its protective duty the State ought to ensure that in delivering its services it also forges a relationship with the recipient that reflects its caring role. The thesis grounds this revised understanding of positive obligations in the evolution of the notion of autonomy within human rights law. It argues that human rights law has gradually shifted away from the vision of the isolated and independent individual that characterised early human rights instruments and towards a more truthful conception of the human person as a needful and sociable person, a process that the CRPD epitomises. While this change has primarily taken place through thematic treaties, the present thesis argues that the most basic characteristics of this revised notion of selfhood — dependence and relatedness — affect us all and ought to be integrated within our mainstream human rights framework. The thesis explores the analytical and practical implications of this argument by drawing from the human rights jurisprudence on positive obligations, which it will revisit on the basis of its own model.

*In the memory of my godmother*

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Undertaking this PhD was for me a personal quest for answers but also a mission. Looking back, I am happy that in my naivety I did not know what I was getting into. Completing this thesis was a difficult and unique journey that gave me some of my happiest but also most difficult moments; I treasure both. Having reached the end of this journey, I hope that I can contribute better to what I believe in. Naturally, I would not have been able to finish this thesis without the immense support I have received by many people.

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## Introduction

### 1. Framing the Debate

In a perceptive Article back in 1984, professor Alston voiced his concern about what he viewed as a haphazard proliferation of human rights principles and norms. The need for a dynamic approach towards human rights, he argued, could not be reasonably disputed. What worried him, however, was the ease with which innovations were taking place at both the UN and scholarly level, and that new rights and norms, often completely unrelated to the original 1948 Declaration, were being proclaimed. "Some such rights", he argued, "seem to have been literally conjured up in the dictionary sense of being 'brought into existence as if by magic'". While the pursuit of a broader reach and scope toward human rights was well-founded, even mandated by the essentially dynamic nature of human rights, caution was advised; the so-far successful project of international human rights law should not be devalued.

In many respects, he explained, international human rights law follows the time-proven technique of mobilising public support by solemnly proclaiming principles of high moral status. The success and undisputed authority of international human rights law stems, to a large extent, from the universal acceptance of these norms. The challenge lies in finding the right balance between the need to maintain the integrity and credibility of the human rights tradition, on the one hand, and the need for an innovative approach that will reflect social changes and address new threats to human dignity and well-being on the other.<sup>1</sup>

It is a well-established principle of international law that agreements must be kept – *pacta sunt servanda*. This fundamental tenet that obliges a State to keep its word every time it enters into a new treaty is considered "since times immemorial the axiom, postulate and categorical imperative of the science of international law";<sup>2</sup> "a self-evident truth", "the foundation-stone of further progress and development."<sup>3</sup> It serves, according to the Vienna Convention on the Law of the Treaties, "the maintenance of international peace and security, the development of

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<sup>1</sup> P. Aston, "Conjuring up New Human Rights: a Proposal for Quality Control", *The American Journal of International Law*, Vol. 78, No 3, 1984, pp. 607- 621

<sup>2</sup> J.L. Kunz, "The Meaning and the Range of the Norm *Pacta sunt servanda*", *The American Journal of International Law*, Vol. 39, No.2, April 1945, p. 180

<sup>3</sup> United Nations Conference on the Law of the Treaties, Extract from the Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole), 26 March- 24 May 1968, p. 151 par. 65

friendly relations and the achievement of co-operation among nations.”<sup>4</sup> Failure by a State to live up to its promises is considered an internationally wrongful act and generates State responsibility.<sup>5</sup>

While many international scholars share Henkin's optimistic belief that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,”<sup>6</sup> it is at the same time widely accepted that international norms are “usually obeyed, but rarely enforced”.<sup>7</sup> States, in other words, adhere to their obligations primarily on their own willingness and not because they are ordered to do so at gunpoint. The question of what kind of incentives prompt an otherwise sovereign State to limit its own action through rule-conforming behaviour continues to puzzle international scholars to this day.<sup>8</sup> What needs to be emphasised, however, for the purposes of the present thesis is that international law works because at the end of the day States want it to work; without this commitment the entire regime of international law risks crumbling to its very foundations.

This Achilles' heel of international law becomes particularly evident in the context of international human rights law. While human rights norms enjoy an undisputedly high moral status and human rights treaties are very strong in promoting them, they are relatively weak in terms of remedies or enforcement. Compared to other areas of international law the human rights regime lacks those forces that ensure compliance.<sup>9</sup> At the same time, States have, objectively speaking, few incentives to comply and monitor each other's behaviour as they are more often than not asked to give up on critical aspects of their sovereignty without necessarily gaining any tangible benefit in return.<sup>10</sup> Therefore, extracting State commitment to obligations which are otherwise unattractive is, for many scholars, both a challenge but also a *sine qua no*, in order to maintain the integrity and long-term viability of the human rights undertaking.<sup>11</sup>

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<sup>4</sup> Vienna Convention on the Law of the Treaties, signed at Vienna 23 May 1969, entry into 27 January 1980

<sup>5</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001

<sup>6</sup> L. Henkin, *How Nations Behave*, Yale University Press, 1961, pp. 47; While the discussion on State compliance exceeds the scope of this paper, for a contemporary review see in particular the highly influential article by O.A.Hathaway, “Do Human Rights Treaties make a Difference?”, *The Yale Law Journal*, Vol. 111, Issue No 1, 2002, pp. 1870 - 2042

<sup>7</sup> H. H. Koh, “Why Do Nations Obey International Law?”, 1997, *Yale Law School, Faculty Scholarship Series*, Paper 2101, p. 2603 See also Guzman, Andrew, “The Consent Problem in International Law”, *Berkeley Program in Law & Economics, Working Paper Series*, 2011, available at <https://escholarship.org/uc/item/04x8x174>

<sup>8</sup> Ibid.; See also B. A. Simmons, “International Law and State Behaviour: Commitment and Compliance in International Monetary Affairs”, *American Political Science Review*, Vol. 94, No. 4, 2000, pp. 819 – 835

<sup>9</sup> Supra fn. , O.A.Hathaway, p. 1946

<sup>10</sup> Ibid.

<sup>11</sup> For a discussion on the relationship between compliance and effectiveness see e.g. Jacoby and Hawkins, “Partial

Whether persuasion or coercion works best on States has been the subject of heated discussions at the scholarly level. It is however difficult to dispute that no matter what prompts States to enter into a human rights treaty in the first place — genuine commitment to the cause of human rights, reputational considerations, self-interests or any other concerns— in order to create realistic expectations of compliance the obligations must at least be clear.<sup>12</sup> At the end of the day, countries simply cannot conform to obligations they do not understand. Providing, therefore, sufficient information about the content of the obligations States subscribe to and the performance expected from them may not by itself secure but will undisputedly facilitate obedience with human rights obligations. Seen as such, if the moral integrity of the human rights regime relies on the appropriate balance between tradition and innovation, compliance with its norms requires the right balance between transparency and continuous adjustment to their evolving definition.

The latest thematic addition to the international human rights system, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which entered into force on 3 May 2008, not only reopens this question but poses probably the biggest challenge in recent years with respect to allying tradition with present needs. Its many doctrinal innovations—such as the fusion of socio-economic and civil-political rights, its approach to equality, the horizontal effect of human rights and many more—render the CRPD, in many respects, the most pioneering document among extant human rights instruments. For the drafters, the CRPD does nothing more than 'elaborate' on extant human rights and provide more 'clarity' on their correlating obligations by bringing to the fore their disability dimension.<sup>13</sup> For many human rights scholars, however, the contribution and impact of the CRPD goes far beyond that. Its innovative features set many new precedents in international human rights jurisprudence, provide new answers to long-standing questions within the human rights discourse and eventually challenge in a very profound manner what we know about human rights altogether.<sup>14</sup> To capture and articulate the

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Compliance: a comparison of the European and Inter-American Courts of Human Rights”, *European Journal of International Law and International Relations*, Vol. 6, Issue no.1, 2010, pp. 35-85;

<sup>12</sup> On the role of clarity in securing State compliance see, among many others, J. Staton and A. Romero, “Clarity and Compliance”, IPSA-ECPR Joint Conference, February 16 to 19, 2011, Sao Paulo; J. Staton and G. Vanberg, “The Value of Vagueness: Delegation, Defiance and Judicial Opinions”, *American Journal of Political Sciences*, Vol. 52 Issue 3, 2008, pp. 504-519

<sup>13</sup> See UN enable site <http://www.un.org/disabilities/default.asp?id=151>

<sup>14</sup> For some first contributions highlighting the CRPD's innovations see R. Kayess and P. French, “Out of the Darkness into the Light? Introducing the Convention on the Rights of Persons with Disabilities”, *Human Rights Law Review*, Vol. 8 Issue 1, 2008, pp 1-34; F. Megret, “The Disabilities Convention: Towards a Holistic Concept of Rights “ *International Journal of Human Rights*, Vol. 12, No. 261, 2008; M.A. Stein and J. E. Lord, “Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and

CRPD's 'paradigm shift', human rights law is, for many scholars, in need of a new 'language' and of a deep normative revision to bridge the old with what seems new.

Within this wider context, the concept of positive obligations — in other words, the duties a State needs to perform in order to fulfil its treaty obligations, rather than what it should abstain from — has assumed a key role in this process of transformation. Having gradually worked its way from the margins of human rights law toward the mainstream over the past decades, the notion of positive obligations has now been thrust to the forefront of human rights protection and fortified with new and wider boundaries. The CRPD envisions a human society where the State has to assume — as a matter of international obligation — a very active role in fostering human flourishing and, to put it simply, keeping its citizens happy. It thereby goes a long way beyond the traditional vision of the abstaining State that only exceptionally engages with human affairs. Under this new and expanded definition of positive obligations, the State is asked to provide material access to all human rights indiscriminately, to delve deep into the private sphere in order to unmask possible sources of coercion and, most crucially, to nurture positive human interaction in all spheres of life.

This new approach both enriches but also obfuscates a concept laden with long-standing ambiguities. Over the past decades much ink has been spilled over the scope, content and even the mere validity and utility of positive obligations as such; and human rights jurisprudence has been rather reluctant in setting out firm normative boundaries. Unlocking where this reinvigorated understanding comes from, how these duties connect to each other and what kind of readjustment is needed to our overall narrative of positive obligations is intriguing in and of itself.

In addition to its theoretical interest, this new vision of positive obligations and the role of the State is also of utmost practical significance. Notwithstanding their vital role as an analytical tool within the human rights machinery, positive obligations have traditionally been associated with lower levels of human rights protection. States are in general more willing to abstain than to act,

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Future Potential”, *Human Rights Quarterly*, Vol. 31, 2010, pp 689-728; F. Megret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?”, *Human Rights Quarterly*, Vol. 30, 2008, pp. 494-516. For a collection of essays on different aspects of the Convention and how they relate to extant human rights doctrine see *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, (eds) O.M.Arnadottir and G. Quinn, Martinus Nijhoff publ., 2009. See also G. Quinn, “Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD”, Harvard Project on Disability Project Conference, 20 February 2010 ; A. Dhanda, “Constructing a new Human Rights Lexicon: Convention on the Rights of Persons with Disabilities”, *Sur.Revista Internacional de Derechos Humanos*, vol. 5, no 8, June 2008, pp. 42-59

and human rights jurisprudence has arguably been more lenient in its supervisory role. This reluctance has left those who most rely on State support — in other words those who are most likely to invoke positive obligations — beyond the scope of mainstream human rights protection. The CRPD is the latest and by far the most robust call in a chain of thematic treaties that have appealed for a more engaged State to better safeguard the rights of marginalised categories. Along with to persons with disabilities there is, however, a longer list of vulnerable categories waiting in line, such as the poor or the elderly. Explaining to States where these new boundaries of positive obligations lie and grounding this re-envisioned concept on firm normative foundations seems, therefore, particularly timely.

Having, therefore, the need for a clear and consistent framework of obligations in an ever-evolving wider legal context as a primary concern, the present study will seek to contribute to the human rights discourse by revisiting the long-standing concept of positive obligations and connecting our extant knowledge with more recent innovations.

## **2. Outline of main argument**

The starting point of this thesis is the position that the answers to many doctrinal queries within the human rights discourse lie within the philosophical assumptions about human nature which guide our legal thinking; in other words, within the metaphors we rely on to describe the human subject. In order to gain a profound understanding of our basic concepts and tools and make sense of the way we apply them we must, therefore, first decipher the kind of human being we have in mind at the outset when we design human rights and their correlating obligations. Without this knowledge, we are less likely to recognise and eventually overcome the conceptual limitations that are tied to this self-imposed image. With this as a point of departure, this thesis will seek to analyse the concept of positive obligations through the lens of the human self.

As a framework of reference we will employ the two most influential schools of thought about the human self, which are at the same time the principal adversaries: the individualistic and the relational theory of the self. It is against this theoretical background that the thesis will sketch the subject of human rights law and trace its development since the 1948 Universal Declaration of Human Rights. We will establish that mainstream human rights law has been based upon the image of a (presumably) individualistic, self-sufficient rights-holder—a choice attributable, in the

main, to political contingencies rather than reasons of legal analysis. The thesis will then argue that although over the past decades this image has been complemented by a series of thematic treaties that have brought it closer to the relational account its individualistic roots have not been erased.

This image has had, however, a restrictive effect on our conceptualisation and application of positive obligations. This is because positive obligations naturally presume a dependent rather than self-sufficient person, and because, in reality, humans ask the State for help not only in terms of resources but also a supportive social environment. The inconsistencies and often unsatisfactory solutions that become apparent in human rights jurisprudence are a result of this mismatch. What is suggested, therefore, is to construct positive obligations on the basis of the relational account of selfhood. Analysing positive obligations on the basis of this expanded understanding of selfhood would bring to the fore the role of caring and fostering relationships in realising human rights and treat them as an integral component of positive obligations. Positive obligations would thus not only require the provision of goods and services, as is currently the case, but also require that these are also provided in the context of fostering relationships, both towards the State and amongst individuals themselves.

Two main consequences would follow therefrom. First, a relational analysis would acknowledge that the realisation of rights does not only depend on access to a minimum level of material welfare, as is the rule now, but also on access to a minimum level of sociability. The State would thus be required to intervene not only when access to this minimum threshold of material welfare is at stake, but also when the rights-holder does not have the possibility of developing a net of private supportive relationships to realise his/her rights or in doing so enters into a situation of complete dependence. Second, every time the State steps in to offer assistance to the rights-holder, its role as a guarantor would not be exhausted by the services and goods it provides but would acknowledge that, at that moment, it forms a relationship with the rights-holder which must meet certain quality standards that reflect its caring role.

On this basis, an analytical framework based on a relational conception of the self would define positive obligations as calls for assistance whenever a person's access to a minimum threshold of material and/or social welfare is at stake. There are three situations in which a human rights violation can occur: first, when the subject asking for assistance is in a situation of structural dependency on the State and naturally unable to access either threshold of minimum material and/or social welfare that would allow the enjoyment of the right; second, when the subject is



impeded to access either by an actively harmful relationship; and third, in all other cases where the subject is neither structurally dependent on the State nor actively harmed by a private relation but nonetheless unable to access either threshold.

To limit the scope of a positive obligation, a relational framework would acknowledge that the State's protective duty can only go as far as laying down the conditions to make autonomy possible. While positive obligations cannot ensure that everybody has a prosperous and happy social life, the State must, as a minimum, ensure that the individual has the possibility of gaining material access to a right and, in so doing, establishing or maintaining relationships of support without either, a) entering into a situation of extreme dependence or, b) severely restricting the autonomy of his/her caregivers because of the necessary kind and quality of care.

On this basis, in order to assess whether the obligation has been discharged, State action would have to be evaluated not only against the material and social adequacy of the goods and services provided, rather the State would also have to demonstrate that these were provided through a fostering relationship to the State. The latter would be assessed against its capacity to secure the agency, participation and dignity of the rights-holder. Unless all aspects of the obligation were fulfilled, the obligation would not be discharged. At a doctrinal level, such a conceptualisation of positive obligations would better reflect the current trend within human rights doctrine, namely an increasing distancing from the individualistic model towards a more relational understanding of selfhood; an evolution epitomised by the recent adoption of the CRPD. At an analytical level, it would offer a more expanded framework capable of both overcoming current weaknesses and integrating the apparent innovations of the latest Convention.

The end-result would be not only a more coherent and comprehensive rights framework, but also a narrative that links past knowledge with what seems new.

### **3. Methodological considerations and the purpose of the thesis**

There are some methodological considerations that run through the whole study and that it is best to outline at this stage. The subject matter of the present thesis is on positive obligations as individual claims rather than as collective demands, which lie beyond its scope. The focus will thus be on positive obligations as they are invoked, interpreted and applied within the context

of individual complaint mechanisms rather than collective complaints procedures. A number of reasons lie behind this choice. At the normative level, it is within this context that positive obligations are likely to encounter their biggest challenges, namely when one single individual asks a whole State to reshuffle its priorities in order to guarantee his/her human rights.<sup>15</sup> It is also in this context that the fundamental idea of international human rights law, namely that every human being is entitled to all human rights, is really put to the test. At the analytical level, it is believed that it is within the context of individual complaints, where facts and law encounter one another, that the boundaries and scope of each theory become most visible and the true adequacy of each framework comes to the fore. Where relevant, collective complaints such as the one dealt with in the context of the European Social Charter (ESC) will be addressed. The main focus, however, will be on individual complaints and it is also within the context of individual complaints mechanisms that the findings of the present study will be empirically tested.

Related to this is the method that will be followed to interpret the image of the human person and its development through human rights law. In particular, the study will rely on the treaty text itself, its jurisprudential development and the drafting process, where complementary information is necessary. With the exception of the Universal Declaration, subsequent soft law documents, such as recommendations and general comments, will not be explicitly referred to. This choice is made on the understanding that they are also policy-oriented and provide States with guidelines the breadth of which often goes way beyond the much more narrow and strict scope of positive obligations at the jurisprudential level. By way of illustration, with respect to the right to life, the Human Rights Committee recommends, in its General Comment, that States take measures to increase life expectancy by eradicating malnutrition and epidemics.<sup>16</sup> In the context of the individual complaints, however, the Committee has followed a much more modest approach in delineating the scope of positive obligations that touch upon social policy issues. In this sense the General Comments are not always indicative of where the contours of an obligation lie within the context of litigation and, accordingly, the kind of rights-holder that their construction assumes.

What also merits explanation is our understanding of human rights law and the choice to develop our analysis on the basis of the UN and the European regional system. As already

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<sup>15</sup> D. Xenos, *Positive Obligations of the State under the European Convention on Human Rights*, Routledge publ., 2012, p 3

<sup>16</sup> HRC, CCPR General Comment No 6: Article 6 Right to Life, Sixteenth session 1982, par. 5

indicated in the opening paragraph, the present thesis subscribes to the view that considers “human rights law” as one *corpus juris*.<sup>17</sup> While each regional and international system has its own specific features, from our standpoint all these different frameworks, binding and non-binding instruments, declarations and treaties form part of the same global system of human rights protection; they stand in a give-and-take relationship, they borrow from one another and set standards and precedents that are of common interest. An evolution at the regional level is of relevance to and influences human rights work at the international level, and vice versa.<sup>18</sup> The focus here, however, will primarily be on developments within the UN and the European regional system. This selection is made not only for reasons of space but also with the understanding that taken together they provide a highly representative picture of the evolution of contemporary human rights law. The UN treaties are included because, given their wide-scale acceptance, they best reflect the views of the international community. The main instruments at the European regional level, meanwhile, have been highly influential in the development of positive obligations under human rights law. The European Convention on Human Rights (ECHR), in particular, is not only the oldest binding human rights instrument but is considered the leading authority in evolving the notion of positive obligations through its jurisprudence.

Before closing this section, some terminological clarifications are useful to minimise confusion. The notion of the “human person”, in particular, is not used here within the meaning of *stricto sensu* legal personhood but in a broader philosophical manner. One of the main questions that this study asks is simply what kind of a human do 'human' rights have in mind? Depending on the fundamental traits attributed to this person, he/she may be classified as reflecting different

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<sup>17</sup> IACtHR, *Case of the “Street Children”, (Villagran-Morales et al.) v. Guatemala*, Judgment of 19 November 1999, par. 194: “Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris*..”. See also ECtHR, *Golder v. the United Kingdom*, Appl. no. 4451/70, Judgment of 21 February 1975, par. 29; see also Article 31 Vienna Convention on the Law of the Treaties: “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

<sup>18</sup> Among the many examples, see, for instance, the reference to the Declaration in all human rights treaties; see also the influence of the case-law of the ECtHR on corporal punishment in the jurisprudence of the IACtHR; see also how the ECtHR borrowed from the case-law on disappearances by the IACtHR; see also the impact of the CRC and the CRPD on the ECtHR interpretation of “the rights of the child” and “reasonable accommodation”.

philosophical accounts of morality, rights theories, and so on. The same distinction applies to the notion of the “rights-holder” in the sense that it should be understood in a generic manner. While there may often be an overlap in the sense that the human person that a legal system has in mind is often also the person who also has legal personhood and legal capacity, this will not always be the case. Children and persons with disabilities, for example, have a standing before human rights mechanisms but that does not mean that we have designed positive obligations according to an image that relates to them.

On a more minor note, “positive obligations” and “positive measures” are treated here as distinct concepts. Positive obligations are legal duties that comprise all types of action that is required from the State. Positive measures refer to the actual steps a State undertakes and are thus understood in a pragmatic sense. Depending on the criteria and typology adopted, some measures fall within the scope of positive obligations while others not.

In closing this introductory section, a final note will be made on the aim of this thesis. As indicated by the title, the present thesis reopens the discussion on positive obligations in the name of disabilities. The main motivation behind this thesis lies in a combination of two events: first, the judgment of the ECtHR in the case of *Sentges v. the Netherlands*<sup>19</sup> in 2003 and the strong belief that the Court simply failed to understand about what the applicant was actually complaining. Second, the adoption of the CRPD in 2006 and its very different narrative about human rights compared to what we had been used to until that point; a narrative about a caring society, all the more convincing because of its closeness to how humans are and how most of us would like the world around us to be. Thus, the primary motivation behind this thesis is to explain why exactly the CRPD was able to tell a particular story about the same human rights, and their correlating obligations, which completely eluded the ECtHR a mere three years earlier. The overall purpose of the thesis, however, is to explain and synthesise within one theoretical framework the multitude of positive duties that have progressively expanded indifferent directions and to suggest a set of analytical tools that will render our account workable in any given legal situation.

The thesis thereby seeks to contribute to the human rights discourse in different ways. First, the thesis contributes to the ongoing debate on positive obligations by offering new answers. After more than thirty years the concept of positive obligations, a most basic tool, still lacks a formal doctrine and there remains much uncertainty and a lack of predictability concerning its

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<sup>19</sup> The case will be analysed in detail in the course of this thesis

application. The thesis introduces a new normative basis to understand and define the term that is grounded in a conception of the human subject as an interdependent and intersubjective being. By juxtaposing this conception of the human to its individualistic counterpart, the thesis answers long-standing questions concerning the content, scope and limits of positive obligations through a new lens that focuses on human interactions, and suggests, on this basis, a new analytical framework. It thereby contributes to the discussion both at the theoretical level — by integrating a new conceptual perspective in the debate — as well as the analytical level — by suggesting new tools to solve legal disputes in a more consistent and predictable manner.

While the subject matter is positive obligations, the present thesis also aspires to contribute to human rights doctrine in a broader manner by making use of under-explored analytical channels and thus widening our frame of reference. It does so, first, by employing the less familiar lens of the human self in order to explain and challenge one of our most basic concepts; and, second, by making prominent the under-explored dimension of human sociability within our legal thinking, thus exploring new ways to think about human rights. In doing so it brings together three different, yet interrelated, scholarly strands — human rights law, disability rights and feminist studies — that have been moving in the same direction without necessarily engaging with one another to the extent one would expect.

Last but not least, ultimately the thesis aspires to contribute to the protection of the rights of persons with disabilities and other marginalised people across human rights law by arguing in favour of a mainstream approach that embraces the perspective on disabilities envisioned within the CRPD.

#### **4. Chapter Overview**

The thesis consists of five chapters that follow sequentially moving from the theoretical to the empirical. As described above, in Chapter I we set out from the philosophical discourse on the self. In light of this discussion, Chapter II explores the theoretical underpinnings of the subject of human rights law. Chapter III narrows the focus to positive obligations and analyses the concept, their scope and limitations on the basis of an individualistic subject of rights. Chapter IV develops a relational approach to positive obligations, the analytical value of which is tested against the case-law of the CRPD Committee. Chapter V appraises the application of the relational model to mainstream human rights analysis by verifying its applicability within an individualistic

framework of rights reflected in the ECHR. Chapter VI concludes the thesis by reflecting on the broader implications of the arguments made in the thesis.

The first Chapter provides the necessary theoretical background upon which the rest of the thesis is built. The Chapter will set out from the notion of metaphor as a tool to interpret the world. After highlighting the centrality of metaphors within legal thinking and their tremendous practical implications, the Chapter will shift its focus to international human rights law. It will establish that its most central metaphor is that of the human subject as a holder of rights. It will argue that deciphering the assumptions about human nature we rely on to describe our subject is of increased normative and analytical significance for understanding our most basic concepts and overcoming current limitations. On this basis, the second part of the Chapter will analytically inquire into the philosophical conception of the human self and its development within the realms of legal theory. Providing its own reading of this broad scholarly discussion, the thesis will discern two influential schools of thought, the relational and individualistic theories of the self. After tracing the origins of this dichotomy in scientific dispute, the Chapter will lay out the main characteristics of each vision of the subject, analyse the strengths and weaknesses of each theory from both a normative and analytical perspective, and outline the growing prominence of this debate across different legal disciplines and contemporary studies of human rights. Through its critical presentation the Chapter will serve as a springboard for the ensuing analysis of positive obligations.

The second Chapter will build on this discussion by bringing the debate about selfhood into the context of human rights law. Drawing from the theories presented in the first Chapter, the main question that will be dealt with is the kind of human being presupposed by international human rights law. Setting out from the 1948 Universal Declaration of Human Rights, the Chapter will trace the evolution of this image up to the entry into force of the Convention on the Rights of Persons with Disabilities. It will establish that the subject of mainstream human rights law as envisioned in prominent instruments such as the ECHR and the ICCPR reflects an individualistic conception of selfhood given the consistent presumption of the material and social self-sufficiency of the rights-holder. The Chapter will argue that this choice is primarily attributable to political priorities that shaped the human rights discourse in the early days rather than to legal reasoning.

The Chapter will then take note of the prolonged dormant state of the dependent person that was foreseen by the socio-economic framework of the ICESCR and the European Social Charter

(ESC), both of which were meant to complement the prominent image of the self-sufficient rights-holder. It will then review a series of subsequent thematic treaties and analyse their role as expressions of scepticism towards this mainstream image. It will argue that it is normatively and analytically false to read into these treaties the establishment of separate categories of rights-holders. Instead we should read in these thematic treaties a collective and increasing effort to complement and retrospectively humanise an unfinished image of the subject by recognising human dependencies. Seen through this lens, the CRPD should be understood as epitomising this process by putting forward the image of the intersubjective legal subject. The Chapter will conclude by juxtaposing to the idea of vulnerability the image of the interdependent person.

The third Chapter will, against this background, discuss the notion of positive obligations. After outlining the jurisprudential birth and development of positive obligations as an analytical tool within human rights law, it will engage with the main scholarly strands concerned with the concept, meaning and scope of positive obligations, and provide answers to long standing questions on the basis of the human self. It will argue that in order to understand the different levels of the State's protective duty we ought to take the standpoint of the individual first and focus on what he/she expects from the State in order to realise his/her autonomy. The characteristics we attribute to human nature will determine the concept, meaning and scope of the obligation. On this basis, Chapter III will argue that if we adopt a moderate relational or individualistic perception of the self it is always normatively possible to distinguish between a call for assistance and a call for abstention. Moving then to the questions of meaning and scope, the Chapter will argue that our mainstream understanding of positive obligations reflects a doctrinal account grounded in an individualistic conception of the self which equates autonomy with self-sufficiency and independence. There is thus an underlying assumption that once access to minimum threshold of material has been achieved autonomy is automatically ensured. Positive obligations are therefrom defined as calls for material assistance that arise whenever the applicant is unable to access this minimum threshold due to prior interference by the State or a private party, or naturally. Accordingly, their scope is circumscribed by the State's financial possibilities.

Using as a test-case the ECHR jurisprudence to examine the outcomes of this model in practice, the Chapter will point to the dramatic disparities in the levels of protection afforded to rights-holders, to the detriment of those who seem naturally unable to realise human rights (as

opposed to the other two categories). It will also highlight the inconsistent and arbitrary manner in which this different granting of levels of protection seems to be done. In providing its own explanation, the Chapter will attribute current shortcomings to the underlying equation of autonomy with independence and the exclusion of fostering relationships as an integral component of the State's obligation. This generates too narrow a basis for analysis that leaves beyond its scope situations where the abstract *telos* of independence seems naturally unattainable. It also lacks the language to articulate situations where coercion lies in the absence of a fostering social environment. While all categories of positive obligations are affected, it is in the third category (that is to say, people who are naturally unable to meet minimum material thresholds to realise their autonomy) where the mismatch between the abstract individualistic subject and the naturally needy and sociable applicant is most clearly exposed. To overcome these boundaries, the Chapter will argue that we ought first to revise our understanding of the human subject.

In place of the individualistic model, the fourth Chapter will suggest a relational approach towards analysing positive obligations. To this end it will first revisit the theoretical discussion of the self and carve out the conceptual and analytical tools relational theories provide us with to solve legal disputes. By integrating these tools into the human rights doctrine, the Chapter will develop an analytical model that defines positive obligations as calls for assistance to attain a minimum threshold of both material and social welfare that make the realisation of a right possible. Positive obligations arise whenever the individual is unable to attain both or either threshold due to a prior behaviour by the State or a private party, or through nobody's immediate prior action. On this basis, the scope of the obligation is no longer circumscribed by the State's financial ability to make the right available, but by the person's sociability, namely the possibility of accessing the right without entering into a relationship of extreme dependence. In addition, to fulfil the obligation the adequacy of the goods and services provided is no longer sufficient, rather the State must deliver these through interactions with the recipient that meet the standards of dignity, agency and participation.

To explore its relevance and applicability to human rights law, the Chapter will test this model against a human rights treaty based on a relational perception of the subject, namely the CRPD. After analysing the subject of the CRPD, the Chapter will relate our suggested framework to the manner in which positive obligations are constructed and applied within the text of the treaty and the CRPD Committee's emerging case-law. The Chapter will conclude by arguing that



analysing positive obligations in terms of human interactions is not disabilities-specific but ought to be applied across human rights law.

The final chapter will appraise the analytical feasibility and normative value of extending our relational approach towards positive obligations to mainstream human rights law. To this purpose it will draw from the case-law of the ECtHR, as a representative individualistic framework, and analyse the Court's approach to interpreting and applying positive obligations against different contexts, which will then be juxtaposed to our alternative relational analysis of the same legal dispute. The argument will be made that in terms of legal analysis, integrating fostering relationships into the structure of positive obligations enhances methodological consistency and, most crucially, captures and addresses sources of coercion that elude our current framework of reference, potentially enhancing human rights protection. Nonetheless, a relational analysis cannot guarantee that all demands for assistance that an individualistic framework cannot fulfil will now be realised. It can ensure, however, that even when a person's wish cannot be fulfilled, his/her sense of selfhood will not be damaged.

## Chapter I: The legal theory of selfhood

### 1. The centrality of metaphors within legal thinking

To understand the law, we must first comprehend legal understanding itself. This requires looking at what lies beneath our legal thinking and decipher the philosophical structures we rely on – more often than not unwittingly – when we give meaning to the law.<sup>20</sup> We should not forget that to give meaning, Ball explains, is in essence a human creation and that human thinking itself is fundamentally metaphoric. We process information and put order in our world by employing metaphors as our central tools.<sup>21</sup> As we humans try to organise the world around us we have a natural tendency to think about our experiences in terms of abstract concepts.<sup>22</sup> Whether we seek to define simple objects such as cups and beds or more complex ideas such as justice or morality we naturally have recourse to imaginative structures that allow us to identify and categorise things in order to arrange and make sense of the reality that surrounds us.<sup>23</sup> Our overall thinking, the way we think and act in our daily lives and the ways in which we relate to others, is, consists of a process during which we imaginatively identify one object with another. To give meaning, Ball concludes, is the outcome of the successful application of selected metaphors in our struggle to define reality.<sup>24</sup>

When it comes to the law we rely on a tremendous number of abstract concepts and multiple metaphors that we derive from all sources of human experience in order to 'remake' reality.<sup>25</sup> Our key legal concepts and our legal reasoning are defined by selected imaginative structures, and we reason using the internal logic of our chosen metaphors.<sup>26</sup> We apply metaphors that live in families of related metaphors.<sup>27</sup> While we like to think, Murray argues, of our legal thinking as a purely rational process, more imagination goes into it than we are willing to admit.<sup>28</sup>

While thinking in metaphors is a natural pre-disposition of all human beings, in the context of

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<sup>20</sup> J. T. Shestack, "The Philosophic Foundations of Human Rights", *Human Rights Quarterly*, Vol. 20, No.2, (May, 1998), pp. 201- 234, p. 201

<sup>21</sup> M. S. Ball, *Lying Down Together. Law, Metaphor, and Theology*, University of Wisconsin Press, 1985, p. 21 as in R.E. Vatz and L. S. Weinberg, "Metaphor and Law: Review", *Law & Society Review*, Vol. 21, No. 5, 1987, pp. 845

<sup>22</sup> J. E. Murray, "Understanding Law as a Metaphor", 34 *Journal of Legal Education*, 1984, pp. 715- 730

<sup>23</sup> Supra fn. 21 M.S.Ball, pp. 845-846

<sup>24</sup> Ibid.

<sup>25</sup> Supra fn.21 J.E. Murray; see also P. Ricoeur, "The Metaphorical Process as Cognition, Imagination, and Feeling", in *On Metaphor*, ed. Sheldon Sacks, 1979, as cited in J. E. Murray, p. 728

<sup>26</sup> M. J. Johnson, "Mind, Metaphor and Law", 58 *Mercer Law Review*, 2006-2007, pp. 845- 868, p. 864

<sup>27</sup> Supra fn .21, M.S. Ball, p. 846

<sup>28</sup> Supra fn. 21 , J.E. Murray

law the choices we make we carry a particular weight. No metaphor can define reality without an inevitable degree of distortion.<sup>29</sup> Whether we select them consciously or not, metaphors reveal only some dimensions of a specific phenomenon while masking others; subconscious metaphors, in particular, by their very nature preclude certain ideas from even being considered.<sup>30</sup> It is therefore crucial, Nedelsky warns, that in the construction of our legal systems we rely on metaphors which direct our attention in the most fruitful way.<sup>31</sup> As each metaphor carries with it its own internal logic and set of expectations, the metaphorical framing we choose to rely on becomes of tremendous legal significance and has huge practical implications. This is not a game, Johnson warns; in the context of law the results of our chosen metaphors could become a matter of life and death for the affected person.<sup>32</sup>

Avoiding metaphors altogether within our legal thinking is not possible, simply because of the way our minds work. In the context of the law the value of metaphors, Murray explains, lies in their ability to trespass the limits of language: through their purposely abstract nature they serve to capture into language an ever-changing reality and conceptualise it in a settled code of predictable conduct; this degree of predictability makes the existence of law itself possible.<sup>33</sup>

Given that metaphors are both inevitable in our legal thinking and are, at the same time, of increased significance in our interpretation of the law the one thing we cannot do is escape responsibility for the metaphoric choices we make. “Lawyers and judges”, Ball argues, “have an obligation to identify the current dominant conceptual law metaphor, accept responsibility for its consequences and undertake to change it if they are not satisfied.” What we cannot do, he argues, is ignore the problem and carry on the business of law untainted by the consequences of our metaphoric choices and resulting behaviour.”<sup>34</sup>

From the standpoint of this wider theoretical discourse, which also sets the point of departure of the present study, in order to make sense of we how think about and apply human rights, why some injustices are left unsettled and why we solve legal problems in certain ways, we must first understand and become aware of the central metaphors upon which our human rights system

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<sup>29</sup> M. S. Ball. *Lying Down Together. Law, Metaphor, and Theology*, p. 21 as in R.E. Vatz and L. S. Weinberg, pp. 845- 847

<sup>30</sup> Ibid.

<sup>31</sup> J. Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law*, Oxford University Press, 2011, p. 99

<sup>32</sup> M. L. Johnson, “Mind, Metaphor and Law”, 58 *Mercer Law Review*, 2006-2007, pp. 845- 868, p. 868

<sup>33</sup> Supra fn. 21 J.E. Murray

<sup>34</sup> Supra fn. 29 M.S.Ball

has been grounded. In the language of rights this is inevitably our perception of the human being.

We structure rights not as abstract and freestanding entitlements but in accordance with a specific image we have about how humans are and act, so that our legal systems can deal with them accordingly. Our understanding of the law and the kinds of social context that we give consideration to in debates about rights, Nedelsky argues, are inextricably linked to the particular perception we have of the human self and the language we use to give content to this image.<sup>35</sup> An optimal metaphor therefore, she explains, is likely to generate a system of rights that will optimally foster human needs and capacities and direct our thinking in the most conducive ways. A misconceived perception of the human being, on the other hand, is likely to create rights that will protect and promote a distorted image of the human person.<sup>36</sup> For a rights-system like the one foreseen by international human rights law in particular, the *raison d'être* of which is precisely our standing as humans and the life this entitles us to, the centrality of the conception of the human person is hard to dispute.

## **2. The added value of understanding the human person posited by human rights law**

Understanding the type of individual on which human rights law is grounded is of course of metaphysical interest for all of us. Unlike animals, we tend to value our status as humans highly. We form a picture of what the good life is and we act to try to realise these images.<sup>37</sup> From a legal perspective, however — which is the interest of the present study — it offers an analytical tool which helps us interpret and understand human rights law in a more holistic and profound manner than can be offered by any purely rights- or obligations-based approach.

At a theoretical level, the metaphor we choose to describe the human being constitutes the 'deep structure' which permeates our human rights systems. We design human rights on the basis of a specific perception of human nature and we resolve moral dilemmas and conflicts in accordance with the restrictions and opportunities implicated in our chosen model.<sup>38</sup> Becoming

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<sup>35</sup> Supra fn. J. Nedelsky, p. 159

<sup>36</sup> Supra fn. J. Nedelsky, p. 159

<sup>37</sup> J. Griffin, *On Human Rights*, Oxford University Press, 2008, p. 109

<sup>38</sup> V. S. Peterson, "Whose Rights? A Critique of the 'Givens' in Human Rights Discourse", *Alternatives: Global*,

aware of the content of our most central metaphor allows us to delve into the theoretical premises of our legal structures and inquire into the limitations of our own attitudes. Seen as such, understanding the human being underpinning our human rights system offers an avenue not only to analyse and understand rights but also expand our conceptualisation of rights by going beyond our own self-imposed assumptions.<sup>39</sup>

From an analytical perspective, by carving out and transcribing the human person posited by human rights law we secure unity within our framework. Adopting the perspective of the human person as a reference, Burgger argues, “seems advantageous in light of the fact that a host of different political claims have been proposed or recognized as human rights. Using a comprehensive and holistic perspective facilitates focusing on the universal core that exists within the multitude of particular claims.”<sup>40</sup> This is harder to achieve if we set, for example, as a point of departure the rights themselves. Given the wide diversity of the entitlements associated with human rights and their lack of uniformity, there would necessarily be fragmentation in the framework of our human rights thinking. Developing a framework which avoids fragmentation is of increased significance in light of the increasing proliferation of human rights instruments. Human rights law already counts nine core UN conventions with least one more underway, as well as a wide range of international treaties and regional instruments,<sup>41</sup> not to mention a long list of soft-law documents. The vision of the human person offers a way to think about human rights as one entity, by focusing on the basic conception of the individual underlying all human rights documents rather than isolating specific groups of rights and duties.<sup>42</sup>

Moreover, by focusing on the person posited beneath human rights law we arguably achieve a more profound understanding of human rights because of the way in which we “‘humanise’ academic reflection”.<sup>43</sup> By giving a face to the rights-holder we carve out a real figure with human traits, with whom every person should be able to connect to. This adds an emotional

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Local, Political, Vol.15, No 3 (Summer 1990), pp. 303-344, p. 304

<sup>39</sup> Ibid.p. 304; J.D. Ohlin, “Is the Concept of the Person necessary for Human Rights?”, *Columbia Law Review*, Vol. 105, 2005, pp. 209-249, p. 221; see also J. Dewey, “The Historic Background of Corporate Legal Personality”, *The Yale Law Journal*, Vol. 35, No 6, 1926, pp. 655-673, in particular pp. 655-656, 659-660

<sup>40</sup> See W. Burgger, “The Image of the Person in the Human Rights Concept”, *Human Rights Quarterly*, Vol.18, No.3, (Aug. 1996), pp. 595-596

<sup>41</sup> According to the UN website, “over 60 human rights treaties elaborate fundamental rights and freedoms contained in the International Bill of Human Rights, addressing concerns such as slavery, genocide, humanitarian law, the administration of justice, social development, religious tolerance, cultural cooperation, discrimination, violence against women, and the status of refugees and minorities.”, as in <http://www.un.org/rights/HRToday/declar.htm>

<sup>42</sup> See W. Burgger, “Das Menschenbild der Menschenrechte”, *3 Jahrbuch für Recht und Ethik*, 121 (1995)

<sup>43</sup> Ibid.

component alongside our rational manner of analysis and allows a more profound and comprehensive understanding of human rights than any purely intellectual understanding can offer.<sup>44</sup>

Finally, understanding the human person underlying our perception of rights can add flexibility and help expand our ways of reading and applying the law in practice. The traditional model of understanding and solving legal problems takes place with reference to casebook people who are structured along the image of the moral person which the legal framework presumes. However, in cases where the real life person does not match the profile of the casebook person, our traditional model of applying the law not only reaches its limits but can ultimately do more harm than good.<sup>45</sup> Understanding, therefore, the person undergirding human rights law opens the way for a legal analysis that is capable of overcoming this type of casebook limitations.

As has been rightly underlined, however, focusing on the person posited by human rights law runs the risk of relativism<sup>46</sup> if the person is too narrowly constructed. In order to avoid this, when deciphering the type of individual that human rights law presumes, the focus will be on those very fundamental traits of human nature, which are traceable to the widest extent possible throughout human rights instruments and practice. The principal aim of this Chapter is thus not to explore all the anthropological details one may be able to carve out, but to reconstruct the basic composition of the human person by focusing on those traits which are of legal interest and, based on this, to then proceed with the rest of study.

### **3. The search for the optimal metaphor within legal theory: two accounts of selfhood**

The philosophical discussion about the human subject within legal theory, aptly referred to as

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<sup>44</sup> Ibid.

<sup>45</sup> See for eg S.Wexlerl, "Practicing Law for Poor People", *The Yale Law Journal*, Vol. 79, No. 5 (Apr., 1970), pp. 1049-1067, "Poor people, he argues, are unfortunately not like the 'casebook people'. They do not lead harmonious and settled private lives into which the law seldom intrudes and the problems that law is asked to solve are not like the ones described in law school casebooks. The traditional model of practising law thus does not only fail to help them but ay even cause harm".

<sup>46</sup> W. Brugger, "Zum Verhältnis von Menschenbild und Menschenrechten", in *'Vom Rechte das mit uns geboren ist' : Aktuelle Probleme des Naturrechts*, Herder publ.2007, pp. 216-247, who argues that analysing rights through the image of the human being risks opening up an ideological rivalry between different images developed across different cultures and nations, such as the homo faber, homo oeconomicus, oecologicus and so on, all of which need to be accommodated, (p. 219).

the debate about the 'human self', could be described as the theoretical inquiry into what qualities and particular traits constitute a human's essential being and on what perception of the human self should our legal systems be based. In essence, the debate comes down to defining what human identities and characteristics we want our legal systems to acknowledge and protect and which ones ought to be discarded as not salient.<sup>47</sup> Or, to put it more simply, what kind of a person do we want our rights-holder to be and what personality traits he/she should be endowed with. The answer to this question is a necessarily metaphorical one, in the sense that it advances a symbolic and imagined vision of the human being loosely rooted in scientific findings but does not reflect a concrete and real person. Yet, understanding this metaphor has tremendous practical implications within our rights systems. It is on the basis of this vision of how humans are or should be, act or should act, and their requirements for living fulfilling lives that we determine the content of legal rights and establish corresponding State duties.<sup>48</sup>

Different philosophies have forwarded different conceptions of the human self depending on the particular human attributes they have prioritised.<sup>49</sup> For the purposes of the present study, the focus will be on the two most influential and competing theories; the theory of individualistic selfhood and its main adversary, that of relational selfhood. These two schools of thought have monopolised discussions within contemporary legal theory and, as will be demonstrated below, are highly relevant to our understanding of human rights, in particular in more challenging areas such as in the field of positive obligations towards vulnerable categories. At this stage it is useful to briefly explain how the quality of relational or individualistic is attributed in this thesis. In particular, from the perspective of the present thesis (which comes from the perspective of a human rights lawyer) theories of the human self are attributed to be relational or individualistic depending on whether or not relationships form a constituent component of the definition of selfhood. It should be noted that the term individualistic is not often used by scholars (those that do not integrate relationships within their notion of autonomy) to describe their own theories; the term 'liberal' is more common. The characterisation 'individualistic' stems, rather, from relational theorists, who through its use underscore the fundamentally atomistic nature of that image of the human. They thereby differentiate it from their own perception of the human as fundamentally social. With regard to

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<sup>47</sup> On the intersection between law and the construction of human personality see in particular C. Douzinas, "Identity, Recognition, Rights or What can Hegel teach us about Human Rights?", *Journal of Law and Society*, Vol. 29, No 3, September 2002, pp 379-405

<sup>48</sup> Ibid. p. 380

<sup>49</sup> Ibid. p. 380

the characterisation of an account as relational, in most cases this coincides with how scholars themselves describe their approach to selfhood. In some cases an account may be self-described primarily as feminist rather than relational. Given, however, that the essential characteristics of feminist approaches exhibit the same approach to selfhood they are labelled here as relational. The rest of this Chapter will be devoted to critically reviewing these two main approaches towards selfhood. The first part will trace the origins of the debate between the two. For reasons of comprehension the section will start with a brief presentation of Kant's seminal work on morality, which laid the philosophical seeds for this dispute, before shifting its focus to the actual legal debate. It will then trace the origins of the dichotomy to a scientific dispute known as the Kohlberg-Gilligan debate, which challenged mainstream theoretical assumptions about human nature and morality. The second part will then discuss in length the individualistic and relational models of the self and engage in a comparative analysis of the two accounts. At the scholarly level, a number of parameters have been taken into account when reviewing the merits of each theory, which range from their soundness at the normative level to their analytical utility and implications at the practical level. After outlining the main features of each school, the focus will be on the principal arguments at both the normative and analytical level, which will be of relevance to the subsequent discussion of positive obligations under human rights law and in particular their perceived failure in areas that matter most to vulnerable people. In closing the discussion, the third section will review the presence of the debate across various areas of law, including human rights law, and identify an increasing trend towards exploring the potential of this alternative relational perception of selfhood.



#### 4. The Background to the Dichotomy: Kant's work and the Kohlberg- Gilligan Debate

The origins of the debate between individualistic and relational selfhood can be traced back to a dispute among psychologists in the early 80s, which became known as the Kohlberg-Gilligan debate. The scientific controversies about human nature and gender diversity it gave rise to went beyond the medical field and reached into the realms of legal theory. They provided legal philosophers with the necessary empirical footing to challenge mainstream philosophical conceptions about morality and rights. For the purposes of putting into perspective the findings of that debate and their significance in the development of legal theory, the Chapter will start with a brief presentation of Kant's philosophical work before elaborating on the actual dispute of the 1980s.

In 1785, German philosopher Kant published his seminal work *Groundwork for the Metaphysics of Morals*. His vision of the morally correct person dominated subsequent discourses within moral philosophy and legal theory and continues to be a primary reference among legal theorists, whether as inspiration or through opposition. While his philosophical mediations have been of broad significance, the focus here will be on the two aspects of his account that are most relevant to our discussion; first, his acknowledgment of reason as the basis of all moral concepts and, second, the connection he drew between human rationality, autonomy and dignity.

Kant's basic idea was that all moral concepts originate from “pure reason”, namely reason as it stands in its authentic form, undiluted by empirical additions from anthropology, physics, theology or occult elements.<sup>50</sup> He justified his normative choice with what appear to be methodological considerations. In order to define morality and determine what actions are in accord with duty, he argued, we should first define our moral imperatives as pure philosophical dispositions detached from any empirical considerations, which may have a distorting effect in our judgment. Applying our moral values to humans as they really are, he explained, should not initially be a consideration, but only come to relevance at a later stage. From this perspective only 'reason', Kant concluded, was capable of providing this level of purity and of allowing us to introduce morality into even the most ordinary and most common-sense concepts.<sup>51</sup>

With pure reason as his point of departure Kant developed a framework of morality that viewed

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<sup>50</sup> I.Kant, *Groundwork for the Metaphysic of Morals*, p. 17

<sup>51</sup> Ibid., p.17

human beings as agents that were by nature rational and endowed with a free will. Contrary to what most philosophers argue, he explained, humans are not simply governed by external laws. They are primarily free beings, because they only obey laws that they themselves have legislated and are bound to act in accordance with their own will.<sup>52</sup> Free will is, however, an asset that only rational beings are capable of. Only reason enables humans to be conscious of themselves, to act upon principle and to have the cause of their actions attributable only to them. By contrast, non-rational beings have only sensory impulses. They are uninterested and act in specific ways because of external influences rather than out of their own will.<sup>53</sup> The freedom to act according to one's will, Kant argued, is, however, not unlimited but compounded by morality. This entails the duty to act in accordance with a maxim that treats humans as ends (rather than means) and that humans would want to turn into universal law.<sup>54</sup> Only rational human beings are, however, capable of such moral reasoning; in the absence of the capacity for pure reason, Kant asserted, humans act morally wrongly.<sup>55</sup>

Free will, which only rational beings are capable of, is thus identical to moral will, and moral will can only mean autonomous will. Moral beings are therefore autonomous beings that obey to no law except their own and are guided by their own internal sense of moral responsibility; and since dignity depends on our capacity for morality, autonomy is then the basis of the dignity of human nature and of every rational being.<sup>56</sup>

Kant's position on the value of human will as a source of law which overruled any other externally imposed power, significantly advanced discussions about individuality, personal autonomy and self-determination. It provided the basis for the development of what would be labelled as the individualistic model of selfhood, which prevailed within legal theory.

In the early 1980s however, Kant's conception of the moral being as a naturally rational, self-reliant and self-ruling individual was put under severe scrutiny. The occasion was a dispute among psychologists concerning the connection between moral maturity, gender and reason,

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<sup>52</sup> Ibid.; for a discussion of Kant's work see also A.Reath, *Agency and Autonomy in Kant's Moral Theory*, Oxford University Press, in particular pp 126-128, where Reath argues that Kant employs the word autonomy in diverse ways but that he seems to see autonomy more as a normative value of the sovereignty a rational person has over himself or herself, and less as a psychological condition as contemporary theories do; see J.Waldron, "Moral autonomy and personal autonomy", as in J.Christman and J.Anderson (eds), *Autonomy and its Challenges to Liberalism, New Essays*, Cambridge University Press, 2005 p. 32

<sup>53</sup> Ibid., p. 50

<sup>54</sup> The other two duties detailed by Kant are the duty to act in accordance with a maxim that could hypothetically turn into universal law and the duty to act in a way which treats humanity as ends and not means

<sup>55</sup> Supra fn. I.Kant, p. 37

<sup>56</sup> Ibid.

which became known as the Kohlberg-Gilligan debate.<sup>57</sup>

In an early piece of research on moral development, conducted by means of presenting ethical dilemmas to interviewees, psychologist Kohlberg reached the conclusion that, compared to men, women scored less in moral reasoning because they were less inclined to make morally right judgments. Unlike men, he explained, women were less likely to take decisions and reason in terms of rights and non-interference. In 1978, by way of disproving Kohlberg's understanding of moral maturity, theorist Gilligan cited a separate psychoanalytical study on gender differentiation that had been carried out by Chodorow. Chodorow's analytical system had found an asymmetry between boys and girls in the development of their identity and selfhood. While girls would develop a sense of identity embedded in relationships, boys' identities were premised on striving for independence.<sup>58</sup> The study went on to explain that this was because in a world where women are the primary caretakers girls are not required to break off their emotional ties with their mother in order to secure their gender identity; boys on the other hand are required to separate themselves from the other gender. Relying on this psychoanalytical framework Gilligan criticised Kohlberg's moral analysis for male bias and argued that alongside the Kantian understanding of morality as impartiality, reason and non-interference, there was a parallel track which understood morality in terms of care, empathy and responsibility. These two understandings of morality were attributable to the two different courses of moral maturity and development between the two genders: boys needed rational skills in order to gain independence, while girls' identity was not threatened by emotion-laden relationships.<sup>59</sup>

Notwithstanding the scientific value of the outcomes of these two theories, the Gilligan-Kohlberg debate had a tremendous impact on the development of contemporary philosophy about selfhood, identity and morality. It provided feminist scholars with the necessary empirical background to critically assess mainstream accounts of personhood and offered a normative basis for the development of alternative theories which valued emotion instead. It is within this ideological framework and its feminist premises that the relational view of selfhood grew as a

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<sup>57</sup> The summary of the Gilligan-Kohlberg debate is based on the two analyses provided by D.T. Meyers' in "The Socialised Individual and Individual Autonomy", pp 140- 151, and by M.Friedman, "Care and Context in Moral Reasoning", pp 191-204, both in *Women and Moral Theory*, (eds) E.F.Kittay and D.T.Meyers, Rowan and Littlefield, 1987; for more see N. Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*, University of California Press, 1978; N.Chodorow, "Gender, Relation, and Difference in Psychoanalytic Perspective," in *The Future of Difference*, ed. Hester Eisenstein and Alice Jardine, Rutgers University Press, 1985; C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, 1982

<sup>58</sup> Ibid. Meyers, p. 142

<sup>59</sup> Ibid. Meyers, p 143

response to individualistic theories.

## 5. The Relational and the Individualistic Accounts of the Self

The individualistic and relational theories of selfhood provide, in essence, two different answers to the same question: what conception of human nature should we utilise when we produce the legal subject? Or, in other words, what kind of image of the legal subject is likely to generate the optimal framework of rights? Consistent with the findings of each side within the Kohlberg-Gilligan debate, individualistic accounts place the emphasis on human rationality and self-reliance, while relational accounts underline the sociable and emotional aspects of human nature.<sup>60</sup>

Despite their differences, which will be analysed in more detail below, there is at least one pivotal common thread that runs through both accounts; this is the idea of self-determination, in other words the value of living the life of one's choice. In both accounts the human desire to be in greater or lesser degrees of control over one's life and over decisions that affect oneself holds a central position. Thus, both individualistic and relational accounts axiomatically proclaim that nobody should be coerced into a life of oppression and that everybody is entitled to a life of choices.<sup>61</sup> Where these two accounts differ and ultimately generate different rights frameworks is on how this "self", that everybody should be true to and live according to, ought to be defined.

For the sake of clarity, it should be noted here that at the scholarly level, this idea of pursuing a life of one's choice is frequently referred to as "autonomy". Inspired by the ancient Greek meaning of the word as "self-law" or "self-rule" scholars of both accounts use this term to describe this ideal of being in charge of one's life, even if the precise content that they eventually subscribe to may differ in substance.<sup>62</sup> The terms "autonomy" and "self" go thus hand in hand within this broader discourse. Several scholars however consider the word autonomy to entail a fundamentally individualistic connotation and associate it with individualistic accounts only, precisely because of the connections that Kant drew between autonomy, rationality and independence. To avoid misinterpretation, it should be clarified that where the term autonomy

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<sup>60</sup> Ibid.

<sup>61</sup> P. Suber, "Self-Determination and Selfhood in Recent Legal Cases", 1992 Emerson Lecture at Earlham College, available at <http://www.earlham.edu/~peters/writing/emerson.htm>

<sup>62</sup> Ibid.

is mentioned here it is understood as this generic idea of deciding about one's self and not within the contours of the individualistic theory of the self to which it is sometimes attributed. In this thesis where autonomy is used strictly in its narrow relational or individualistic meaning this will be explicitly indicated.

## **6. The individualistic model of selfhood within legal theory**

The individualistic conception of the self does not correspond to one single theoretical account of selfhood. The term 'individualistic' seems to have been employed primarily by its critics and is now used to describe *a contrario* those contemporary accounts that do not consider social relationships to be a constitutive element of the self. It comprises, thus, a wide range of accounts, some of which are more individualistic than others. The division followed here will be between classical individualism, the main features of which will be outlined below, and its more nuanced variant, contemporary individualism. At the normative level, central to all such accounts is their being embedding in reason.

### **a. Classical individualism**

Inspired by Kant's normative endorsement of reason, early individualistic accounts of the self put forward a picture of the human being as an exceptionally intellectual being and posited rationality, often of a very high threshold, as the necessary criterion for autonomy.<sup>63</sup> They were based on the assumptions, first, that the individual did not depend on any supportive social arrangements and materialistic conditions to pursue the life of his/her choice and, second, that humans functioned in isolation from their social environment.

Humans were thus depicted as fundamentally self-reliant and atomistic units, who understood their lives without reference to their fellow humans and who realised their rights through their own resources. The ability to think autonomously and take control of one's life did not come in variations or degrees, but was an all or nothing quality. This absence of any substantial social

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<sup>63</sup> R.Young, *Personal Autonomy: Beyond Positive and Negative Liberty*, International Series of Social and Political Thought, Croom Helm publ., 1986, pp. 10-11

context is the main reason why these early accounts were subsequently criticised for hyper-individualism.

In terms of rights, early individualistic accounts gave rise to a normative framework that was very narrowly construed and exclusive. In terms of legal personhood, the pre-condition of high intellect left beyond the protective scope of the law not only people with cognitive impairments but also larger segments of the population. "It will appear", Dworkin commented, "that it is mainly professors of philosophy who exercise autonomy and that those who are less educated, or who are by nature or upbringing less reflective, are not, or not as fully, autonomous individuals."<sup>64</sup>

The emphasis on the independence and self-sufficiency of the human subject also meant that freedoms and rights were understood in primarily negative terms of non-interference. In order to live an autonomous life, scholars agreed, all that was required was the removal of coercive arrangements which could otherwise impede a person's freedom. Once the human being was left alone, he/she would be in a position to be the author of his or her own life and live in accordance with his/her own value-system. Such a person was therefore best assisted if others stood aside.<sup>65</sup> The basic idea behind rights was thus to allow the person to shed off all constraints and at the same time maximise his or her independence.<sup>66</sup> From an analytical perspective, this also meant that coercion was constructed on a very narrow intellectual basis. Rugged individualistic theorists, Young argued, focused too much on external oppressive arrangements that could interfere with a person's choices while overlooking the obstructing effect of internal constraints, such as the effect of psychological barriers.<sup>67</sup>

Critics attributed this impoverished view of the human being primarily to its grounding in the idea of reason, which inevitably associates selfhood and self-determination with notions of atomism and self-sufficiency. In Nussbaum's view, for instance, the way that the Kantian person exercises moral reasoning is through an inward-looking and self-regarding process which concerns the individual alone. The realisation of autonomy is therefrom understood to be a process that the individual able to undertake on his or her own, without requiring the interaction or assistance of others. Autonomy is thus inevitably equated with self-sufficiency and

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<sup>64</sup> G.Dworkin, *The Theory and Practice of Autonomy*, Cambridge Studies in Philosophy, 1988, p. 17

<sup>65</sup> J.Anderson and A.Honneth, "Autonomy, Vulnerability, Recognition and Justice", *Autonomy and the Challenges to Liberalism: New Essays*, CUP, 2005, p. 129; see also P. King 's foreword in R.Young, fn. 63

<sup>66</sup> Ibid J.Anderson and A.Honneth, p. 129; see also S.M.Reindal, "Independence, Dependence and Interdependence: some reflections on the subject and personal autonomy", *Disability&Society*, Vol. 14, no 3, 1999, pp 353-367

<sup>67</sup> Supra fn.63 R.Young, p.4

independence.<sup>68</sup> By contrast emotions imply relatedness, vulnerability and dependency and allow for a more nuanced understanding of self-determination.<sup>69</sup>

This type of individualistic view, which provide a rather narrow basis for generating and analysing rights is, however, no longer much held in contemporary theory, which has developed towards more inclusive individualistic accounts.

## **b. Contemporary individualism**

The development towards more inclusive accounts of selfhood could not have taken place unless their grounding in reason was revised. This does not mean that the notion of reason was abandoned altogether, but its content and the degree of intellect required to achieve it were redefined. It was thus accepted that humans do not take decisions in the calculative way of pure reason that Kant had envisaged. Alongside rationality, many contemporary scholars acknowledge that humans also experience emotions and affection which are part of one's personality and it is wrong to portray them as being in a constant struggle with reason. "Even the most autonomous of people do not generally act in a profit-maximising manner".<sup>70</sup> The impact of emotions and affect needs to be, however, of an "appropriate degree" so as not to compromise the authenticity of the judgment. Where appropriateness lies, Christman explains, depends on the demands of the situation: "a person can be overly emotional or he or she can lack the requisite emotional 'skills'." Both the inability to call upon one's emotions altogether and the inability to control them compromise the capacity for autonomy.<sup>71</sup> Rationality remains, therefore, even in contemporary accounts, the primary competence criterion for autonomy. There has been a shift, however, from demanding high intellectual capacity to requiring a minimum set of cognitive skills, the precise level of which varies across different accounts.<sup>72</sup> In Raz's influential work for example, this "minimum set of mental capacities" comprises a

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<sup>68</sup> M.Nussbaum, *Upheavals of Thought: the intelligence of emotions*, Cambridge University Press, 2001, as analysed by C.A.Ball, "This is not your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective", *Harvard Journal of Law and Gender*, vol 28, 2005, p. 355

<sup>69</sup> Ibid.

<sup>70</sup> I.Young, "Autonomy and Socialisation", *Mind, New Series*, Vol 89, Oct 1980 no 356, p. 568

<sup>71</sup> J. Christman, "Autonomy, Independence and Poverty-Related Welfare Policies", *Public Affairs Quarterly*, Vol. 12, No. 4, October 1998, p. 388

<sup>72</sup> For a critical overview on how the notion of "reason" has been defined across the different accounts see J.Christman, "The Concept of Autonomy", *Ethics*, Vol. 99, No. 1, (Oct., 1988) in particular p. 115, as well as supra fn. 63, R.Young, in particular pp. 10-12

minimum rationality, the ability to comprehend the means required to realise one's goals and the mental faculties to plan one's actions.<sup>73</sup> For Christman, what matters is critical competence, capacity for self-reflection and freedom from mental disorder, neurosis and, in general, compulsive decision-making<sup>74</sup>. For Young meanwhile, "not being seriously irrational" suffices.<sup>75</sup> In terms of rights, this is an image of the human subject that more people can relate to compared to the Kantian archetype. The requirement, however, of a minimum level of cognitive abilities as a *sine qua non* condition for autonomy still leaves certain categories beyond the protective scope of the law. Critics, primarily from feminist circles, have, for example, pointed out that this almost clinical emphasis on critical perception fails to capture the more complex psychology and behaviour of people who are oppressed and partially marginalised as knowers.<sup>76</sup> Women victims of domestic violence and their inability to find sufficient protection within such a legal system are an often-cited example.<sup>77</sup> In addressing the exclusion of persons with mental disabilities feminist scholar Kittay has also described how her daughter Sesha, who has severe cognitive impairments and cannot speak, is nevertheless very capable of showing what matters to her: she responds to her environment and likes engaging with specific persons, displays emotions and affection and appreciates music.<sup>78</sup> Not paying consideration to her choices and values would however not constitute coercion under this model. On the other hand, for those that are included this framework offers protection against paternalistic behaviours, for example large-scale, indiscriminate bans.

Acknowledging that the human will is not as self-controlled as early individualists had envisioned, brought with it the realisation that humans are less self-sufficient and self-controlling as initially assumed.<sup>79</sup> Contemporary scholars thus agree that no person can be the

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<sup>73</sup> J. Raz, *The Morality of Freedom*, Claredon Press, 1986, pp 373-374

<sup>74</sup> Supra fn. 70 J. Christman, pp. 387-388

<sup>75</sup> It is not clear how Young understands rationality since, in an earlier publication, he described that while rationality seems to be a positive requirement for autonomy and has a position in the makeup of the autonomous person, it should be seen as something other than a necessary condition for becoming such a person. In the later *Personal Autonomy* Young argues that rationality is obviously linked to autonomy and not being seriously irrational seems necessary, p. 12. Nevertheless most individualistic accounts, as Christman notes, do seem to require a certain degree of rationality, see also supra fn. 70 J. Christman, pp. 387-389

<sup>76</sup> For a collection of essays see *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, ed. By C. Mackenzie and N. Stoljar, Oxford University Press, 2000

<sup>77</sup> For a discussion highlighting the main arguments see M.A Dutton, "Understanding Women's Responses to Domestic Violence; a Redefinition of Battered Women Syndrome", *Hofstra Law Review*, Vol. 21, Issue 4, pp. 1191- 1242

<sup>78</sup> E.Kittay, "At the Margins of Moral Personhood", *Ethics*, vol 116, Oct. 2005, pp 100- 131

<sup>79</sup> See for example R.Dworkin who argues that "For autonomy requires us not only to allow someone to act in what he takes to be his best interests, but to allow him to act in a way he accepts is not in his interests at all. This is sometimes a matter of what philosophers call 'weakness of the will'", "Autonomy and the Demented Self", *The*



author of his or her life without the existence of certain institutional and material arrangements that make an autonomous life possible.<sup>80</sup> Such conditions are linked to the options a person has in determining his or her life,<sup>81</sup> and having options, does not mean having one option but an adequate variety thereof.<sup>82</sup> A person is not autonomous, however, if he/she cannot take advantage of the options that are offered.<sup>83</sup> The basic idea is to create a material environment that eliminates factors inhibiting the development and exercise of autonomy and at the same time lessens the suffering of those who are most affected by deprivation.<sup>84</sup>

Translated into rights, the acknowledgement of dependence as an inherent part of human nature has allowed space for the development of positive obligations alongside negative ones. While this expansion of contemporary individualism was initially meant to cover some basic socio-economic conditions such as homelessness, hunger or poverty, it has since grown across a wider spectrum of rights to cover all autonomy-enhancing conditions.<sup>85</sup> The advantage of this framework is that it is capable of accommodating the needs of individuals for whom the realisation of their rights depends on the existence of external support without singling them out from the rest of the citizens.<sup>86</sup> Proponents of individualistic accounts have argued that such a framework is, for example, capable of securing basic goods and services to those in need such as the poor, children, pregnant women and persons with disabilities.<sup>87</sup>

An important question that this framework leaves open, however, concerns the contours of a life of choice and, consequently, of positive rights. The test and criteria to measure the adequacy and variety of choices offered to the human subject seem to be rather vague. As Raz rightly notes, "how much control is required for the life to be autonomous, and what counts as an adequate exercise of control (as opposed to being forced by circumstances...) is an enormously difficult problem".<sup>88</sup> This has provided fertile ground for debate, both among supporters of

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*Millbank Quarterly*, vol 64, suppl 2: Medical Decision Making for the Demented and Dying", 1986, p. 8

<sup>80</sup> Supra fn. 73, Raz

<sup>81</sup> Supra fn. 73 Raz, pp. 373-374 ; supra fn. 63, R. Young

<sup>82</sup> Supra fn. 73 Raz, pp. 373-374

<sup>83</sup> Ibid.

<sup>84</sup> Supra fn. 70, J. Christman, pp. 392-393

<sup>85</sup> Supra fn. 70, J. Christman, pp. 392-393; supra fn. 70 I. Young, p. 566; supra fn. 65 J. Anderson and A. Honneth, p. 129

<sup>86</sup> Supra fn. 70, J. Christman, "The attribution of autonomy does not presuppose a detached disconnected individual with no social ties or personal dependencies. Dependence is ubiquitous; but dependence conflicts with autonomy only when those dependencies stultify or distort our authentic selves; if the factors upon which we depended crush or impair our abilities to formulate and act on our settled sense of self then our true independence is denied." "Autonomy, Independence and Poverty-Related Welfare Policies", p. 386

<sup>87</sup> Ibid.

<sup>88</sup> Supra fn. 73 J. Raz, pp 373- 377; see also supra fn. 70 J. Christman, "There are not universal and objective criteria

individualistic accounts as well as their critics. One strand of discussion concerns the ability of this framework to secure autonomy-ensuring conditions, in particular to those in need, rather than merely offering certain basic resources. A second and related vein of disagreement concerns the avenues offered to contextualise the rights claim, namely taking sufficient consideration of a person's perspective when assessing the contours of his/her rights. For Christman, an influential proponent of individualistic autonomy, “there are not universal and objective criteria for the adequacy of options; it depends on one's (authentic) values and life-plan.”<sup>89</sup> In his view, the key lies in ensuring that material provisions do not aim at guaranteeing independence in general but rather independence which is reflective of a person's authentic will; only then, he argues, is autonomy realised.<sup>90</sup> To demonstrate his point he engages in an insightful critique of US welfare policies. Welfare recipients who receive support but do not also have access to training and skill development programs that expand their employment opportunities, he argues, may appear to be gaining independence but their autonomy has been compromised; even if their lives are materially improved and they eventually find employment, their life activities will not be the result of critical reflection and authentic choice.<sup>91</sup> For critics of individualistic accounts, however, such as Fineman and Nedelsky, the roots of the problem are more structural and lie in the wrongful idealisation of the independent subject. This inevitably delegitimises more dependent individuals and their claims.<sup>92</sup>

Aside from reliance on material conditions, some contemporary accounts in mainstream philosophy – albeit not all – acknowledge that humans are not isolated and detached beings, but define their lives within a context of social relationships. Such accounts concede that we are all surrounded by social and interpersonal relations, which affect our personalities and according to which we construct meaning for ourselves. This connection we feel with others, the argument continues, may sometimes affect the moral judgments we make in particular situations.

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for the adequacy of options; it depends on one's (authentic) values and life-plan”, p 402

<sup>89</sup> Ibid.

<sup>90</sup> Ibid. Christman argues that the use of 'independence' as a free-standing notion is imprecise since: “No person, then, is simply independent. [...]. Indeed, I would claim that the deeper value at stake in discussions of independence and self-sufficiency is “autonomy”. To be autonomous is to be an authentic, competent self, not to be independent *per se* but to be independent of those factors and influences which would disrupt or destroy one's ability to function as a unique person. The attribution of autonomy does not presuppose a detached, disconnected individual with no social ties or personal dependences. Dependence is ubiquitous; but dependence conflicts with autonomy only when those dependencies stultify or destroy our authentic selves; if the factors upon which we depended crush or impair our abilities to formulate and act on our settled sense of self, then our true independence is denied.”, p. 386

<sup>91</sup> Ibid. J. Christman, “There are not universal and objective criteria for the adequacy of options; it depends on one's (authentic) values and life-plan”, pp. 396-397

<sup>92</sup> This argument is analysed in more detail in the next section on relational autonomy.

However, it does not go so deep as to become a constitutive element of our autonomy; our inner freedom and capacity for critical reflection remain essentially intact.<sup>93</sup> This last position, namely whether we can ever claim to be truly independent from our social context, is also where the disagreement between individualistic and relational scholars becomes most vehement; the latter, as will be demonstrated in more detail below, treat relationships as an integral part of human selfhood.

In a legal context, such a perception of human nature leads to the creation of rights from which social context is either entirely missing or, when included, is structured along the normative vision of the subject as a fundamentally analytical person. To illustrate how this works in practice, an examination of the right to property and its application to divorcing spouses can offer some useful insights.<sup>94</sup> When calculating the property share of each spouse following a divorce, different solutions have, at times, been followed. One is to separately calculate the financial contributions of each spouse throughout the period of marriage by means of dates and sums of transactions and, based on this, resolve any property disputes. Another is to simply divide the relevant property in half and hand each spouse an equal share, independent of who holds the title. In both cases an individualistic approach is arguably identifiable because both outcomes treat the subjects involved as abstract and freely-choosing agents. What is missing is to place the two within an environment of interdependent subjects connected by family ties and to deconstruct their contributions during their shared life, as well as subsequent obligations, within this context. Likewise, as other commentators have observed, what is also missing is taking into account the wider community context and how societal perceptions of the role of each spouse might have affected the terms of their marriage.<sup>95</sup> The difference such a contextualisation would make in practice is not insignificant; by treating the spouses as if they were two strangers many indirect contributions, such as house-hold labour, risk going unacknowledged. In addition, the particular contributions and needs of the respective spouses in

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<sup>93</sup> Supra fn.70J. Christman, who argues that: “It must be the case, however, that the autonomous person could, at least in a piecemeal manner, subject various aspects of herself – including her deep connections with others and the conditions and value commitments of her own development – to critical reflection without eliciting self-alienation.” pp. 388-389

<sup>94</sup> For a thorough analysis and more examples see in particular the review of Canadian family case law in R. Leckey, “Contextual Subjects: Family, State and Relational Theory”, University of Toronto Press, 2008, pp. 31-100

<sup>95</sup> Ibid. R. Leckey, pp. 45-48; For a discussion on the restriction of women's rights because of mainstream conceptions of personhood see also S.M. Matambanadzo, “Embodying Vulnerability: a Feminist Theory of the Person”, *Duke Journal of Gender Law & Policy*, Vol. 20, 2012, pp. 45-83

post-divorce life are likely to be overlooked.<sup>96</sup> An alternative interpretation, Leckey argues, is that the individualistic approach does in fact take into account social context and connects subjects with concrete and identifiable relationships, in this case through marriage status and their wider community; though the more individualistic the approach, the more formal and thick are the criteria, methodologically speaking. Where the disagreement really lies, he argues, is not the focus on relationships *per se*, but the normative views reflected in the outcomes.<sup>97</sup> He concedes though, that taking into account relationships in all fields of the law does not seem normatively appropriate.<sup>98</sup>

Critics of individualistic accounts place much emphasis on the refusal of individualistic theorists to regard relationships as an integral component of human nature. Relationships, they argue, count among the central experiences of our existence. Treating relationships as an external situation that a person steps in and out of, through optimal choice, is normatively flawed because it does not adequately reflect the reality of the human condition.<sup>99</sup> For persons with disabilities and their caretakers (the majority of whom are women), for example the social dimension cannot be convincingly viewed as an occasional situation. Connected to this is the argument made earlier that the minimal significance accorded to relationships generates a framework of rights that overlooks responsibilities embedded in specific relationships; and that it also fails to acknowledge the role of the larger society and the State in delivering justice to individual claims.<sup>100</sup>

Another major criticism raised by relational theorists is that when individualistic accounts do take relationships into consideration, they tend to focus primarily on their negative side and the potentially harmful impact of a person's social surroundings, but do not consider the ways in which relationships can also foster autonomy. Relationships are thus primarily perceived as threatening or intrusive to one's sphere of self-determination.<sup>101</sup> In analysing the effects of

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<sup>96</sup> See the scholarly analysis on Canadian family case-law provided by Leckey, who argues however that even a strict individualistic approach may reflect a specific normative vision of thick interdependent subjects.

<sup>97</sup> Ibid. R. Leckey

<sup>98</sup> R. Leckey, "Family, State and Relational Theory", University of Toronto Press, 2<sup>nd</sup> revised edition, 2008, pp. 22-23 and pp. 31-33; Both R. Leckey and J. Nedelsky agree that the element of human relations in the area of administrative law, such as the interaction between bureaucrat, institutions and citizen is largely left unacknowledged, with Nedelsky however arguing that this is normatively undesirable.

<sup>99</sup> L. Code, "Second Persons", in *What can she know? Feminist theory and the Construction of Knowledge*, Chapter Three, Cornell University Press, 1<sup>st</sup> ed., 1991, pp. 71-119, p. 76; see also N. des Rosiers, "Introduction" in *Personal Relationships of Dependence and Interdependence in Law*, (ed.) The Law Commission of Canada, The University of British Columbia Press, 2002, p. xi

<sup>100</sup> See M. Minow and M. L. Shanley, "Relational Rights and Responsibilities: Revisioning the Family in liberal Political Theory and Law", *Hypatia*, vol. 11, no. 1, (Winter) 1996, pp. 4-26

<sup>101</sup> Supra fn , L. Code, pp. 73-76; Supra fn N. des Rosiers, pp. vii- xvii

socialisation, Young, for example, refers to the ways in which social influences and relationships are capable of constraining a person's autonomy; sometimes in an obvious way, for example by means of threat and manipulation, and other times in an unconscious manner, by shaping a person's inner self and diminishing one's capacity for self-criticism and autonomous choice-making.<sup>102</sup> This discrepancy between selfhood and otherness, Code explains, is, however, structurally weak. By failing to acknowledge the importance of fostering relationships, theorists essentially place self-determination and reliance on others in a relationship of trade-off; "the person has to buy interdependence at the cost of some measure of autonomy".<sup>103</sup> To demonstrate the pitfalls of such an approach Nedelsky cites welfare rights as an example. Recipients of social assistance, she argues, are often treated by the legal system as passive objects that are excluded altogether from decision-making processes or are subjected to demeaning behaviours by judgmental caseworkers. Beneath such paternalistic and humiliating attitudes, she argues, lies an assumption that individuality and collectivity stand in some kind of opposition and that reliance on external assistance is a form of weakness; by allowing the encroachment of other people in one's private sphere a person has lost part of his/her capacity for self-determination. To alleviate this tension, she argues, we need to acknowledge the potentially positive role of relationships – in this case between the bureaucrat and the welfare recipient – in fostering the right at stake and to articulate this within our legal analysis.<sup>104</sup>

Further points of criticism concern the limitations of individualistic accounts as analytical tools. In Leckey's view, by often failing to pay close attention to the social contexts in which humans interact, the human subject, and consequently the entitlement to rights, remains largely acontextualised. In this sense individualistic accounts are methodologically weak when it comes to concretising abstract rights norms in individual contexts.<sup>105</sup> In Code's view, individualistic accounts also create an unnecessary "tension for moral agents between claims of impartiality and of particularity". Kantian morality, she explains, commands an impartial respect for rights. However, this goes against our own intuition to be subjective and to care for our fellow humans.<sup>106</sup> It also puts the emphasis on rights and attaches little significance to the

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<sup>102</sup> Supra fn. 63, R. Young

<sup>103</sup> Supra fn. , L. Code, p. 76

<sup>104</sup> J. Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities", *Yale Journal of Law and Feminism*, Vol. 1 : 4, 1989, pp. 13-15; see also supra fn. J. Nedelsky, *Law's Relations*, p. 304

<sup>105</sup> Supra fn. R. Leckey, p.17, 24, 26-28

<sup>106</sup> Supra fn. L. Code, p. 76

responsibilities we owe to each other.<sup>107</sup>

In criticising their limitations as analytical tools, Code also questions their ability to serve equality. The conceptual tools that individualistic accounts grant us, she explains, are limited and not flexible enough to accommodate diversity. Individualistic ontology is based on a stripped-down version of selfhood that casts humans as anonymous and interchangeable rational beings.<sup>108</sup> Setting formal sameness as a starting point hampers, however, the development of analytical tools to deal with diversity and accommodate morally significant differences.<sup>109</sup> "The best that such theories can allow ... is a bare recognition of difference-in-isolation, which may be tolerated, but requires neither understanding nor care"<sup>110</sup>

Several recent contributions have taken a more nuanced position by underlining a gradual convergence between individualistic accounts and their main adversary, relational accounts. In her thorough analysis of contemporary conceptions of selfhood, feminist scholar Friedman argues that individualistic accounts are no longer as individualistic as their critiques claim because they do not deny the social nature of human beings altogether. She cites passages from various works to prove her point. In one such example, Dworkin notes that "to be committed to a friend or cause is to accept the fact that one's actions, and even desires, are to some extent determined by the desires and needs of others...[..]" Thus, she argues, some accounts – albeit, she admits, not all – converge with relational accounts on this point; namely, on the significance of relationships to our understanding of selfhood.<sup>111</sup> The influential scholar Christman, a supporter of individualistic accounts, makes a similar argument by claiming that no contemporary account of selfhood and autonomy can claim firm footing by leaving out altogether the social dimension of human nature.<sup>112</sup> There is a difference, however, between accepting that social circumstances may affect a person's autonomy, the importance of which he acknowledges, and denying a person's individuality altogether.<sup>113</sup> He therefore wonders whether we are indeed in need of a new notion of autonomy, as relational scholars argue, or simply a fuller individualistic account. In commenting on the convergence between individualistic and

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<sup>107</sup> Supra fn. L. Code, pp. 80-81

<sup>108</sup> Ibid. p. 80

<sup>109</sup> Ibid. p. 80

<sup>110</sup> Ibid.

<sup>111</sup> M.Friedman, "Autonomy and Social Relationships", in *Feminists Rethink the Self*, (ed) D.T.Meyers, Westview Press, 1997, pp 51-58; the same argument is also developed by her in *Autonomy, Gender and Politics*, Oxford University Press, 2003, pp 87-93

<sup>112</sup> J.Christman, "Relational Autonomy, Liberal Individualism and the Social Constitution of Selves", *Philosophical Studies*, vol. 117, no 1/2, Jan 2004, pp 143-164

<sup>113</sup> Ibid.

relational theories, Leckey also recently argued that the contemporary individualistic subject is not as detached as it used to be; in fact what relational and contemporary individualistic theorists really disagree with are the types of relationships and normative commitments their accounts suggest, rather than the absence of a social context altogether.<sup>114</sup>

It is precisely due to this nuanced stance towards the role of social relationships, however, that such accounts are labelled by their critiques as being individualistic or atomistic.<sup>115</sup> While this difference may appear at times fine, the supporters of relational accounts maintain that its implications are nonetheless significant; omitting relationships as a structural component of human nature deeply affects our perception of the subject and, consequently, the way we realise rights — a position which will be analysed in more detail immediately below.

## 7. The relational model of selfhood

The relational approach to selfhood does not correspond to a single unifying theory<sup>116</sup>. It is rather used as an 'umbrella' term that encompasses those views of selfhood which are premised "on the shared conviction that persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity."<sup>117</sup> In other words, relational accounts are premised on the idea that as humans we form our personalities and develop our values, skills, concerns and outlook not in isolation but in interaction with other humans, such as family, teachers and friends. Our identities are, in this sense, socially embedded because they are constituted through a web of interpersonal and societal relationships.

Having this as a starting point, relational theorists contend that all key concepts, starting from the idea of selfhood and autonomy and ending with the notion of rights, ought to be understood in terms of our relationships to others. The density, scope and nature of these relationships then

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<sup>114</sup> Supra fn. R. Leckey, pp. 24-28

<sup>115</sup> Supra fn M. Friedman

<sup>116</sup> The first feminist scholar to have used the term relational autonomy was J. Nedelsky, who sought to apply a relational understanding in the field of administrative law. Subsequent influential contributions focusing primarily on the role of women have traditionally come from the area of family law, such as M. Minow and M.L. Shanley and, in a health care context, S. Sherwin.

<sup>117</sup> C.Mackenzie and N.Stoljar, "Introduction", *Relational Autonomy*, supra fn. , p. 4; some scholars use the terms "relational autonomy" and "social autonomy" interchangeably. Christman distinguishes between the two terms as follows: relational views, he argues, seem to underscore interpersonal dynamics as components of autonomy, eg caring, interpersonal dependence etc., while social views have a broader perspective and include also other kinds of social factors such as institutional settings, cultural patterns etc.

vary across different accounts.<sup>118</sup> For many scholars this relational dimension of selfhood should even encompass the relationship of one's self to one's body. Self and body, they say, are not always necessarily experienced as one unit but stand in relationship to each other. What the self wants is not necessarily what the body can do and the self does not always relate to the body, even if we only notice it when something is seriously wrong with our bodies or we feel devalued because of our embodiment.<sup>119</sup>

Some scholars within feminist circles have questioned whether seen from this perspective there is even a need to talk about personal autonomy as an individual value at first place. Some accounts, for instance, place so much emphasis on the social dimension of selfhood that the internalist part of human nature seems to be dismissed altogether.<sup>120</sup> Contemporary theorists, however, tend to agree that there is value in maintaining the idea of autonomy as a form of self-determination.<sup>121</sup> However, it should be re-conceptualised in a way that would adequately address the social embeddedness of humans and their constraints.<sup>122</sup>

At the normative level, relational theorists set out by rectifying what they regard as the source of the problem – the idea of 'pure reason'. Instead of rationality, they argue, which produces an inevitably narrow basis on which to construct our legal frameworks, rights theories should be grounded in emotion.<sup>123</sup> Emotions, Nussbaum argues, are not blind forces without selectivity or intelligence, as is often assumed, but are forms of evaluative thought.<sup>124</sup> They have a rich cognitive and intentional content and involve evaluative judgments that "ascribe to certain things and persons outside a person's own control great importance for the person's own

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<sup>118</sup> See in particular the overview and very helpful categorisation of relational theories provided by R. Leckey, *supra* fn. , pp. 7- 22 who distinguishes, amongst others ,between intrinsically relational and causally relational theories depending on the role they attribute to the social context, and between weak and strong relational accounts on the basis of their normative commitment, pp. 11-13

<sup>119</sup> C.Ells, "Lessons about Personal Autonomy from the Experience of Disability", *Social Theory and Practice*, Vol. 27 No 4, October 2001, pp 601-602; for a recent discussion see collection of essays in *Embodiment and Agency*, (eds) S. Campbell, L. Meynell and S. Sherwin, Pennsylvania State University Press, 2009

<sup>120</sup> For a comprehensive discussion and convincing counter-argument see, in particular, M.Friedmann, *fn.* 38 pp 29-55; see e.g. M.Oshana, who rejects internalist accounts of autonomy and advocates for an external socio-relational conception of autonomy, "Personal Autonomy and Society", *Journal of Social Philosophy*, Vol. 29 No. 1, Spring 1998, pp. 81-102;

<sup>121</sup> See among the many authorities L. Barclay, who argues that "to consider which particular attachments we should reshape, which to reject, which to choose, and which to promote, we need autonomy. [...] We need and should cherish the capacity to decide and choose", p. 68, *supra* fn., L. Barclay, "Autonomy and the Social Self", pp. 52-71

<sup>122</sup> *Supra* fn. , C.Mackenzie and N.Stoljar, "Introduction", pp.1- 4.

<sup>123</sup> See in particular the very useful summary of the analysis between emotion and reason offered by C.A.Ball, in "This is not your father's autonomy: lesbian and gay rights from a feminist and relational perspective", *Harvard Journal of Law and Gender*, Vol 28, 2005, pp 355-357.

<sup>124</sup> M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, 2001, p. 22 as in C.A. Ball



flourishing".<sup>125</sup> There is thus in principle no valid ground why emotions cannot constitute determinants by virtue of which actions are right or good and why they cannot, therefore, contribute to autonomy. "Emotions, desires, passions, inclinations, or volitions - in short, any mental state involving any motivation or attitude at all - would all constitute reasons in this sense....what matters in this context is that emotions and desires, as well as imagination, can constitute a kind of reflection on or attention to objects or values of concern".<sup>126</sup>

A first implication of setting emotion as the grounding norm is that rationality can no longer act as the defining characteristic of the human subject and his/her capacity for autonomy. Relational accounts promote a picture of humans as fundamentally emotional and sensitive beings instead. All humans, they argue, have feelings and all humans are naturally inclined to seek a life according to their own values and preferences. Translated into rights this means that everybody – not only the majority – is presumed to be capable of autonomy, independent of the level of their cognitive abilities. While the exact competency criteria vary across the different accounts,<sup>127</sup> the general conception is that a person who is able to express in some way a preference for what matters to him or her qualifies as a rights-holder even if he or she lacks the necessary cognitive skills. "When someone's consideration", Friedman describes, "of whatever mental sort, involves reaffirming what she wants or values as something important to her... then she realises some degree of autonomy."<sup>128</sup> This has the advantage of creating a particularly inclusive framework which reaches out even to the most severe forms of cognitive impairment, as the case of Kittay's daughter described earlier.

A second implication of setting emotion as the grounding norm is that selfhood and autonomy are cleared from any notion of self-sufficiency and independence; instead, they are equated with life-long dependency and reliance on external assistance and support. For relational scholars every human being is naturally needy and vulnerable. This universal vulnerability is attributed directly to the grounding of their account in emotions. Emotions, Nussbaum tells us, "involve acknowledgements of neediness and lack of self-sufficiency, emotions reveals us as vulnerable to events that we do not control".<sup>129</sup> In order to lead a life of choices every human being requires, therefore, not only the absence of a coercive disabling context but also the

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<sup>125</sup> Ibid.

<sup>126</sup> Supra fn., M.Friedman,p. 10.

<sup>127</sup> See in particular the collection of essays in *Relational Autonomy*, supra fn.

<sup>128</sup> Ibid. p. 9

<sup>129</sup> Supra fn. , M. Nussbaum, p 12

presence of enabling background facilities.<sup>130</sup> It should be noted that while relational accounts appear to converge at this point with contemporary individualism, there is nonetheless a distinct difference in the perspective. For relational scholars, we are all deeply dependent and needy throughout our lives, even if some ways are less obvious than others. It is thus not that only some of us – such as the poor, the elderly or the disabled – are needy and lack self-sufficiency; independence is in fact an illusion. At the theoretical level this means that human nature is cleared from any notion of self-reliance while neediness and vulnerability become the norm instead of the exception. In terms of rights, this shifts the focus to positive obligations and to the role of the State as a guarantor of rights, as opposed to the deeply-rooted image of the presumably-abstaining State foreseen by individualistic accounts. However, it is not clear whether this shift in perspective would always be adequate to overcome the weaknesses of the adequacy test of choices described earlier. In Nedelsky's view, which also brings us to the next point, even if the relational account cannot always provide definitive answers it is capable of offering more insights. In the case of social benefit systems, for instance, “the quantity of the benefits alone, could not tell us whether the standard has been met. The recognition that rights structure relations of equality and respect (or their opposites) would focus the adjudicators' attention on the network of relations established or maintained by the system of benefits — and on whether that network was one within which people could be full participants in society”.<sup>131</sup>

The defining characteristic of relational accounts, which is also the reason behind their name, is the importance they accord to human relationships. For relational scholars it is wrong to portray the human being as a person who interacts with other humans by choice or sporadically because humans are essentially social beings:<sup>132</sup> “the self exists fundamentally in relation to others”.<sup>133</sup> “We come into being”, Nedelsky argues, “in a social context that is literally constitutive of us. Some of our most essential characteristics, such as our capacity for language and the conceptual framework through which we see the world, are not made by us, but given to us ... through our interactions with others.”<sup>134</sup> One's sense of selfhood is therefore not a static notion, but a kind

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<sup>130</sup> Ibid., p. 14

<sup>131</sup> J. Nedelsky, *Law's Relations*, pp. 48-49

<sup>132</sup> Supra M. Friedman, p. 58; see also M. Friedman, *Autonomy, Gender and Politics*, Oxford University Press, 2003, who describes the inherently social nature of autonomy as one of the major unresolved issues of autonomy theory: “is autonomy merely the (nonsocial) result of certain other social conditions or is it inherently social in its very nature? This unresolved issue, I suggest, is one major philosophical concern....” p. 96

<sup>133</sup> A. Donchin, “Autonomy and Interdependence: Quandaries in Genetic Decision Making”, in C. Mackenzie and N. Stoljar, *supra* fn. p. 239

<sup>134</sup> J. Nedelsky, 1989, as in R. Leckey, *supra* fn. p. 8

of wisdom that a person develops throughout his/her life and always with reference to other humans. Likewise, the ability to be the author of one's life, the realisation of autonomy, is not something that just happens to a person as individualistic accounts appear to argue. Living according to one's true self, according to one's deeper values, wants or desires is an ability that a person cultivates within an ongoing process; autonomy, in other words, comes in degrees and domains,<sup>135</sup> and is realised within relationships that provide the necessary support and guidance.<sup>136</sup> "Implicit in the idea of acting according to wants.... that are one's own, is the idea that one might have acted according to the wants... of *others* but did not do so."<sup>137</sup> Relatedness with others is, therefore, a precondition for autonomy, and interdependence a permanent component of it.

Translated into the language of law, this means that we ought to define our basic legal concepts and to analyse rights in terms of relationships. Instead of seeing human interaction as governed by a clash between rights and interests, Nedelsky explains, we should instead focus on the ways patterns of relationships can develop and sustain an enriching life and autonomy.<sup>138</sup> The objective is then "to foster the optimal relationships in every given setting".<sup>139</sup>

The answer as to what are these 'optimal' relationships is, however, not as clear-cut as one might have expected and is often approached in a rather abstract manner. As regards the type and range of relationships that are of interest, these are primarily interpersonal relationships, namely relations between the subject and other individuals. These tend to be divided into relations of an intimate nature (family, partner, close friends) and into social contacts and acquaintances of a non-intimate nature (neighbourhood, work, school, social clubs, community, political activity and participation),<sup>140</sup> with most scholarly accounts focusing on the former. Many accounts also refer to the wider social context within which these relationships are embedded, for instance economic systems, political structures, historical context and cultural traditions, thus addressing relations of an institutional and structural nature.<sup>141</sup> The main idea behind including such relationships is that very often our personal relationships are themselves

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<sup>135</sup> D. Meyers, "Feminist Perspectives on Individual Choice", *The Journal of Philosophy*, November 1999, Vol. 94:11, pp. 619-628, p. 626

<sup>136</sup> Supra J.Nedelsky, supra fn. p. 12

<sup>137</sup> Supra fn. M.Friedman

<sup>138</sup> See in particular the review provided by R. Leckey, supra fn. pp. 13-17

<sup>139</sup> Ibid., p. 12

<sup>140</sup> C. Mackenzie, "Imagining Oneself Otherwise", in *Relational Autonomy*, supra fn. p. 141; see also J. Anderson and A. Honneth, supra fn.65, pp. 131-132

<sup>141</sup> See also R. Leckey, supra fn. pp. 18-19; see also M. Minow and M.L Shanley, supra fn. , p. 24

embedded within wider societal contexts which deeply affect them. We should imagine, Minow explains, our selves as embedded in layers of relationships, starting from the most personal ones and moving on to the wider societal structures. Leckey has criticised relational theorists, however, on the grounds that that whilst most of them agree on the normative importance of the broader social structures within the relational understanding of selfhood, they are not always consistent in how they address these two sets of connections within their theories. Some appear to draw a clear distinction between the social context and the set of interpersonal relationships; others, however, seem to fuse them within one wider contextual approach. In his view, personal relations and institutional relations are distinct but they can be used interchangeably within what he calls a wider contextual methodology.<sup>142</sup> While there is merit to his argument, the solution he suggests is — as Nedelsky rightly argues — a change of terminology. In her view, a relational analysis might as well be consistently applied throughout the whole spectrum of interpersonal and institutional relations. Which precise relationships out of those we choose to include will depend, then, on the kind of dispute we are asked to resolve. As for the question which ones are the “optimal” relations, Leckey discerns two normative approaches towards defining these relationships: first, there are those accounts that argue that there is no pre-fixed answer to this question. According to this view, there is no need to normatively commit beforehand to any kinds of relationships; instead it suffices to simply think about relationships or focus on them and the analysis will itself guide us to the optimal results.<sup>143</sup> In demonstrating how this would look in practice, he refers to Nedelsky's argument that when analysing a legal problem it is enough “if we focus on the kinds of relationships that are involved and the kind of relationships we think a legal regime is likely to foster”.<sup>144</sup> “The

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<sup>142</sup> Among the most influential contributions is M. Minow and M.L. Shanley, which argues that “Relational rights and responsibilities should draw attention to the claims that arise out of relationships of human interdependence. [...] An adequate theory of family would also have to recognise the relationship between family and the political and economic order.” They then go on to argue that all relationships are “deeply affected but not entirely determined by the political system and economic circumstances. Connecting these relationships to a vibrant sense of responsibility would engage wide circles of people.. who would need to consider what social and economic structures are necessary to permit continuous, caring human relationships, especially responsive to the most dependent ones.. [...] A satisfactory theory of family law would thus have to reach the operations of the political and legal systems... so that people people who are presently marginalised could come to participate effectively in the debates and decisions that frame entitlements essential to sustaining viable family lives” *supra* fn. , p. 24

<sup>143</sup> R. Leckey, *supra* fn. pp. 13-14, see however also Nedelsky's response in *Law's Relations*, “In sum, then, what are my core substantive normative commitments in this project? I share the commitment to recognition of the value of care, of the need to construct just relations with caregivers, and of the need for more explicit recognition and protection of the value of intimate relations. These commitments flow from the relational approach, though they are not my primary subject here.”, *supra* fn. p. 83

<sup>144</sup> *Ibid.*, p13

question of which relationships we want” is then up to us to decide.<sup>145</sup> The second approach is less moderate and has a clear normative position, namely that optimal relationships are those which are conducive to (relational) autonomy. As for which ones precisely these are, relational accounts do not use a single attribute to describe them, but refer to them as “fostering” and “caring” relationships, which are juxtaposed to an “oppressive” and “coercive” social environment; most often they encompass notions of compassion, friendship, recognition, acceptance, mutual support, interdependence and co-operation. Nedelsky, for example, refers to “caring, responsible and intimate relationships with each other — as family members, friends, members of a community, and citizens of a state”.<sup>146</sup> Minow and Shanley focus on “relationships of human interdependence” and responsibility at a structural level which will in turn permit “continuous, caring human relationships” at a more personal level.<sup>147</sup> Held talks about “relations of empathy and mutual intersubjectivity”, where both parties contribute not only to cover their needs but also to “affirm 'the larger relational unit' they compose”.<sup>148</sup> In general, the normative views of relational theories could be summarised as being structured around the notions of connection and interdependence; with interdependence referring more to the power balance in the relation,<sup>149</sup> and connection to its more subjective internalist values and emotional dimension – such as trust, intimacy and security. The intensity of this connection varies across the different spheres of life we engage with. Leckey has summarised these as “thick and interdependent” relationships,<sup>150</sup> a term that has not necessarily been welcomed by relational theorists. For the purposes of the present study, the term used here will be “caring and fostering” relationships with the understanding that fostering covers issues of objective external power asymmetries and caring the needs for the internal wider spectrum of emotions

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<sup>145</sup> Ibid., p.13

<sup>146</sup> J. Nedelsky, “Property in potential life? a relational approach to choosing legal categories” *Canadian Journal of Law and Jurisprudence*, Vol. 6, 1993, p.. 343

<sup>147</sup> M. Minow and M.L. Shanley, “Relational rights and responsibilities should draw attention to the claims that arise out of relationships of human interdependence. Those claims entitle people to explore a range of relationship sand in so doing to draw sustenance from the larger community...Connecting these relationships to a vibrant sense of responsibility would need to consider what social and economic structures are necessary to permit continuous, caring human relationships”. *supra fn.*

<sup>148</sup> V. Held as in C. Mackenzie and N. Stoljar, “Introduction”, *supra fn.*, p. 22

<sup>149</sup> On the definition of interdependence see for eg I.Kerr, “Personal Relationships in the Year 2000: Me and My ISP”, *Personal Relationships of Dependence and Interdependence in Law*, p.. 94 “Since the nature of a social exchange is dyadic, it is usually the case that *both* parties involved in a personal relationship are to some extent dependent on their relationship. The notion of *interdependence* in a relationship describes the extent to which the well-being of both parties is dependent upon the existence of the relationship.<sup>73</sup> Usually, this means that each party has some power over the other. Thus, as the level of interdependence increases in a relationship, each party becomes restricted in terms of the power that can be exerted upon the other with impunity. Increasing interdependence ultimately results in an equilibrium in terms of the power structure underlying the relationship “

<sup>150</sup> R. Leckey, *supra fn.*, pp. 14-15,

(care, trust, intimacy, relatedness etc.) that are found across the different accounts.

In analysing the normative aspects of relational theories, Leckey also concludes that scholars of the first approach endorse the idea of caring and fostering relationships, even if they are sometimes less forthright about it. In justifying his position, he explains that shifting attention to relationships alone may be valuable as a methodological consideration, but is *per se* not sufficient to reproduce the relational values. In his view, it is not that a focus on any relationships will necessarily reflect the norms of relational selfhood; a relationship might equally serve the normative views of individualistic autonomy, an outcome no relational theorist would be prepared to endorse.<sup>151</sup>

When comparing their normative basis of analysing rights to the one of individualistic accounts, relational scholars underscore the capacity of their framework to unmask hidden forms of oppression, often embedded in human relations, which would otherwise go unnoticed.<sup>152</sup> There is a difference, they explain, between living according to one's true identity and making life choices according to one's traits and characteristics and the social expectations that come with them.<sup>153</sup> "Behaving or living autonomously is a matter of behaving or living in accord with what matters to someone, not of living in accord with characteristics of hers or categories applied to her that she does not particularly care about."<sup>154</sup> Too often, however, we do not live according to our true values because we are coerced into our traits-based identity. In some cases, the choices that the social context makes available to us preclude us, on account of our traits, from realising those choices we would have valued.<sup>155</sup> In other cases we may not live according to our true values because our decision-making processes may be flawed on account of the fact that we are given limited information due to stereotypes, or because we make decisions based on what is expected from us rather than in accordance with what we truly value.<sup>156</sup> By way of illustration, feminist scholar Wendell, drawing from her own experience in dealing with a chronic disease, has described how once the disease manifested itself she suddenly had a new identity imposed on her – that of disability – and how she felt socially coerced into a life to which she could not relate.<sup>157</sup>

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<sup>151</sup> R. Leckey, *supra* fn. pp. 13-17

<sup>152</sup> S. Sherwin, "A relational approach to autonomy in health care", *The politics of women's health: exploring agency and autonomy*, Temple University Press, 1998, pp. 19-47, pp 19-20

<sup>153</sup> *Ibid.*

<sup>154</sup> *Supra* Friedman

<sup>155</sup> *Supra* S. Sherwin, pp. 28-32

<sup>156</sup> *Ibid.*

<sup>157</sup> S. Wendell, "Towards a Feminist Theory of Disability", *Hypatia*, Vol.4, No 2, Summer 1989

A second major argument put forward is that the relational approach provides a basis for analysing rights which more adequately overcomes the dichotomy between private and public. Nedelsky explains that the idea of boundary between the private and public spheres has been cultivated by individualistic views because they isolate the individual and focus on the oppositional aspect of socialisation. Rights and selfhood are understood therefrom to be some kind of private property, which have to be protected from outsiders. Likewise autonomy and collectivities are viewed as standing in a relationship of trade-off, as if the increase in the exercise of the one necessitates the restriction of the other. In her view, this boundary not only fails to correspond to reality, but also presents difficulties when dealing with cases where the public intrudes in previously private areas, such as in situations of dependency or affirmative obligations.<sup>158</sup> If we accept, however, the reality of interdependence and relatedness in human

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<sup>158</sup> J.Nedelsky, *supra* fn.

Further points of criticism concern the limitations of individualistic accounts as analytical tools. In Leckey's view, by often failing to pay close attention to the social contexts in which humans interact, the human subject, and consequently the entitlement to rights, remains largely acontextualised. In this sense individualistic accounts are methodologically weak when it comes to concretising abstract rights norms in individual contexts. In Code's view, individualistic accounts also create an unnecessary "tension for moral agents between claims of impartiality and of particularity". Kantian morality, she explains, commands an impartial respect for rights. However, this goes against our own intuition to be subjective and to care for our fellow humans. It also puts the emphasis on rights and attaches little significance to the responsibilities we owe to each other.

In criticising their limitations as analytical tools, Code also questions their ability to serve equality. The conceptual tools that individualistic accounts grant us, she explains, are limited and not flexible enough to accommodate diversity. Individualistic ontology is based on a stripped-down version of selfhood that casts humans as anonymous and interchangeable rational beings. Setting formal sameness as a starting point hampers, however, the development of analytical tools to deal with diversity and accommodate morally significant differences. "The best that such theories can allow ... is a bare recognition of difference-in-isolation, which may be tolerated, but requires neither understanding nor care"

Several recent contributions have taken a more nuanced position by underlining a gradual

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convergence between individualistic accounts and their main adversary, relational accounts. In her thorough analysis of contemporary conceptions of selfhood, feminist scholar Friedman argues that individualistic accounts are no longer as individualistic as their critiques claim because they do not deny the social nature of human beings altogether. She cites passages from various works to prove her point. In one such example, Dworkin notes that "to be committed to a friend or cause is to accept the fact that one's actions, and even desires, are to some extent determined by the desires and needs of others...[..]" Thus, she argues, some accounts – albeit, she admits, not all – converge with relational accounts on this point; namely, on the significance of relationships to our understanding of selfhood. The influential scholar Christman, a supporter of individualistic accounts, makes a similar argument by claiming that no contemporary account of selfhood and autonomy can claim firm footing by leaving out altogether the social dimension of human nature. There is a difference, however, between accepting that social circumstances may affect a person's autonomy, the importance of which he acknowledges, and denying a person's individuality altogether. He therefore wonders whether we are indeed in need of a new notion of autonomy, as relational scholars argue, or simply a fuller individualistic account. In commenting on the convergence between individualistic and relational theories, Leckey also recently argued that the contemporary individualistic subject is not as detached as it used to be; in fact what relational and contemporary individualistic theorists really disagree with are the types of relationships and normative commitments their accounts suggest, rather than the absence of a social context altogether.

It is precisely due to this nuanced stance towards the role of social relationships, however, that such accounts are labelled by their critiques as being individualistic or atomistic. While this difference may appear at times fine, the supporters of relational accounts maintain that its implications are nonetheless significant; omitting relationships as a structural component of human nature deeply affects our perception of the subject and, consequently, the way we realise rights — a position which will be analysed in more detail immediately below.

## **7. The relational model of selfhood**

The relational approach to selfhood does not correspond to a single unifying theory. It is rather



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used as an 'umbrella' term that encompasses those views of selfhood which are premised "on the shared conviction that persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity." In other words, relational accounts are premised on the idea that as humans we form our personalities and develop our values, skills, concerns and outlook not in isolation but in interaction with other humans, such as family, teachers and friends. Our identities are, in this sense, socially embedded because they are constituted through a web of interpersonal and societal relationships.

Having this as a starting point, relational theorists contend that all key concepts, starting from the idea of selfhood and autonomy and ending with the notion of rights, ought to be understood in terms of our relationships to others. The density, scope and nature of these relationships then vary across different accounts. For many scholars this relational dimension of selfhood should even encompass the relationship of one's self to one's body. Self and body, they say, are not always necessarily experienced as one unit but stand in relationship to each other. What the self wants is not necessarily what the body can do and the self does not always relate to the body, even if we only notice it when something is seriously wrong with our bodies or we feel devalued because of our embodiment.

Some scholars within feminist circles have questioned whether seen from this perspective there is even a need to talk about personal autonomy as an individual value at first place. Some accounts, for instance, place so much emphasis on the social dimension of selfhood that the internalist part of human nature seems to be dismissed altogether. Contemporary theorists, however, tend to agree that there is value in maintaining the idea of autonomy as a form of self-determination. However, it should be re-conceptualised in a way that would adequately address the social embeddedness of humans and their constraints.

At the normative level, relational theorists set out by rectifying what they regard as the source of the problem – the idea of 'pure reason'. Instead of rationality, they argue, which produces an inevitably narrow basis on which to construct our legal frameworks, rights theories should be grounded in emotion. Emotions, Nussbaum argues, are not blind forces without selectivity or intelligence, as is often assumed, but are forms of evaluative thought. They have a rich cognitive and intentional content and involve evaluative judgments that "ascribe to certain things and persons outside a person's own control great importance for the person's own flourishing".

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There is thus in principle no valid ground why emotions cannot constitute determinants by virtue of which actions are right or good and why they cannot, therefore, contribute to autonomy. "Emotions, desires, passions, inclinations, or volitions - in short, any mental state involving any motivation or attitude at all - would all constitute reasons in this sense....what matters in this context is that emotions and desires, as well as imagination, can constitute a kind of reflection on or attention to objects or values of concern".

A first implication of setting emotion as the grounding norm is that rationality can no longer act as the defining characteristic of the human subject and his/her capacity for autonomy. Relational accounts promote a picture of humans as fundamentally emotional and sensitive beings instead. All humans, they argue, have feelings and all humans are naturally inclined to seek a life according to their own values and preferences. Translated into rights this means that everybody – not only the majority – is presumed to be capable of autonomy, independent of the level of their cognitive abilities. While the exact competency criteria vary across the different accounts, the general conception is that a person who is able to express in some way a preference for what matters to him or her qualifies as a rights-holder even if he or she lacks the necessary cognitive skills. "When someone's consideration", Friedman describes, "of whatever mental sort, involves reaffirming what she wants or values as something important to her... then she realises some degree of autonomy." This has the advantage of creating a particularly inclusive framework which reaches out even to the most severe forms of cognitive impairment, as the case of Kittay's daughter described earlier.

A second implication of setting emotion as the grounding norm is that selfhood and autonomy are cleared from any notion of self-sufficiency and independence; instead, they are equated with life-long dependency and reliance on external assistance and support. For relational scholars every human being is naturally needy and vulnerable. This universal vulnerability is attributed directly to the grounding of their account in emotions. Emotions, Nussbaum tells us, "involve acknowledgements of neediness and lack of self-sufficiency, emotions reveals us as vulnerable to events that we do not control". In order to lead a life of choices every human being requires, therefore, not only the absence of a coercive disabling context but also the presence of enabling background facilities. It should be noted that while relational accounts appear to converge at this point with contemporary individualism, there is nonetheless a distinct difference in the perspective. For relational scholars, we are all deeply dependent and needy

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throughout our lives, even if some ways are less obvious than others. It is thus not that only some of us – such as the poor, the elderly or the disabled – are needy and lack self-sufficiency; independence is in fact an illusion. At the theoretical level this means that human nature is cleared from any notion of self-reliance while neediness and vulnerability become the norm instead of the exception. In terms of rights, this shifts the focus to positive obligations and to the role of the State as a guarantor of rights, as opposed to the deeply-rooted image of the presumably-abstaining State foreseen by individualistic accounts. However, it is not clear whether this shift in perspective would always be adequate to overcome the weaknesses of the adequacy test of choices described earlier. In Nedelsky's view, which also brings us to the next point, even if the relational account cannot always provide definitive answers it is capable of offering more insights. In the case of social benefit systems, for instance, “the quantity of the benefits alone, could not tell us whether the standard has been met. The recognition that rights structure relations of equality and respect (or their opposites) would focus the adjudicators' attention on the network of relations established or maintained by the system of benefits — and on whether that network was one within which people could be full participants in society”.

The defining characteristic of relational accounts, which is also the reason behind their name, is the importance they accord to human relationships. For relational scholars it is wrong to portray the human being as a person who interacts with other humans by choice or sporadically because humans are essentially social beings: “the self exists fundamentally in relation to others”. “We come into being”, Nedelsky argues, “in a social context that is literally constitutive of us. Some of our most essential characteristics, such as our capacity for language and the conceptual framework through which we see the world, are not made by us, but given to us ... through our interactions with others.” One's sense of selfhood is therefore not a static notion, but a kind of wisdom that a person develops throughout his/her life and always with reference to other humans. Likewise, the ability to be the author of one's life, the realisation of autonomy, is not something that just happens to a person as individualistic accounts appear to argue. Living according to one's true self, according to one's deeper values, wants or desires is an ability that a person cultivates within an ongoing process; autonomy, in other words, comes in degrees and domains, and is realised within relationships that provide the necessary support and guidance. “Implicit in the idea of acting according to wants.... that are one's own, is the idea that one might have acted according to the wants... of *others* but did not do so.” Relatedness with others is,

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therefore, a precondition for autonomy, and interdependence a permanent component of it.

Translated into the language of law, this means that we ought to define our basic legal concepts and to analyse rights in terms of relationships. Instead of seeing human interaction as governed by a clash between rights and interests, Nedelsky explains, we should instead focus on the ways patterns of relationships can develop and sustain an enriching life and autonomy. The objective is then “to foster the optimal relationships in every given setting”.

The answer as to what are these 'optimal' relationships is, however, not as clear-cut as one might have expected and is often approached in a rather abstract manner. As regards the type and range of relationships that are of interest, these are primarily interpersonal relationships, namely relations between the subject and other individuals. These tend to be divided into relations of an intimate nature (family, partner, close friends) and into social contacts and acquaintances of a non-intimate nature (neighbourhood, work, school, social clubs, community, political activity and participation), with most scholarly accounts focusing on the former. Many accounts also refer to the wider social context within which these relationships are embedded, for instance economic systems, political structures, historical context and cultural traditions, thus addressing relations of an institutional and structural nature. The main idea behind including such relationships is that very often our personal relationships are themselves embedded within wider societal contexts which deeply affect them. We should imagine, Minow explains, our selves as embedded in layers of relationships, starting from the most personal ones and moving on to the wider societal structures. Leckey has criticised relational theorists, however, on the grounds that that whilst most of them agree on the normative importance of the broader social structures within the relational understanding of selfhood, they are not always consistent in how they address these two sets of connections within their theories. Some appear to draw a clear distinction between the social context and the set of interpersonal relationships; others, however, seem to fuse them within one wider contextual approach. In his view, personal relations and institutional relations are distinct but they can be used interchangeably within what he calls a wider contextual methodology. While there is merit to his argument, the solution he suggests is — as Nedelsky rightly argues — a change of terminology. In her view, a relational analysis might as well be consistently applied throughout the whole spectrum of interpersonal and institutional relations. Which precise relationships out of those we choose to include will depend, then, on the kind of dispute we are asked to resolve.

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As for the question which ones are the “optimal” relations, Leckey discerns two normative approaches towards defining these relationships: first, there are those accounts that argue that there is no pre-fixed answer to this question. According to this view, there is no need to normatively commit beforehand to any kinds of relationships; instead it suffices to simply think about relationships or focus on them and the analysis will itself guide us to the optimal results. In demonstrating how this would look in practice, he refers to Nedelsky's argument that when analysing a legal problem it is enough “if we focus on the kinds of relationships that are involved and the kind of relationships we think a legal regime is likely to foster”. “The question of which relationships we want” is then up to us to decide. The second approach is less moderate and has a clear normative position, namely that optimal relationships are those which are conducive to (relational) autonomy. As for which ones precisely these are, relational accounts do not use a single attribute to describe them, but refer to them as “fostering” and “caring” relationships, which are juxtaposed to an “oppressive” and “coercive” social environment; most often they encompass notions of compassion, friendship, recognition, acceptance, mutual support, interdependence and co-operation. Nedelsky, for example, refers to “caring, responsible and intimate relationships with each other — as family members, friends, members of a community, and citizens of a state”. Minow and Shanley focus on “relationships of human interdependence” and responsibility at a structural level which will in turn permit “continuous, caring human relationships” at a more personal level. Held talks about “relations of empathy and mutual intersubjectivity”, where both parties contribute not only to cover their needs but also to “affirm 'the larger relational unit' they compose”. In general, the normative views of relational theories could be summarised as being structured around the notions of connection and interdependence; with interdependence referring more to the power balance in the relation, and connection to its more subjective internalist values and emotional dimension – such as trust, intimacy and security. The intensity of this connection varies across the different spheres of life we engage with. Leckey has summarised these as “thick and interdependent” relationships, a term that has not necessarily been welcomed by relational theorists. For the purposes of the present study, the term used here will be “caring and fostering” relationships with the understanding that fostering covers issues of objective external power asymmetries and caring the needs for the internal wider spectrum of emotions (care, trust, intimacy, relatedness etc.) that are found across the different accounts.

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In analysing the normative aspects of relational theories, Leckey also concludes that scholars of the first approach endorse the idea of caring and fostering relationships, even if they are sometimes less forthright about it. In justifying his position, he explains that shifting attention to relationships alone may be valuable as a methodological consideration, but is *per se* not sufficient to reproduce the relational values. In his view, it is not that a focus on any relationships will necessarily reflect the norms of relational selfhood; a relationship might equally serve the normative views of individualistic autonomy, an outcome no relational theorist would be prepared to endorse.

When comparing their normative basis of analysing rights to the one of individualistic accounts, relational scholars underscore the capacity of their framework to unmask hidden forms of oppression, often embedded in human relations, which would otherwise go unnoticed. There is a difference, they explain, between living according to one's true identity and making life choices according to one's traits and characteristics and the social expectations that come with them. "Behaving or living autonomously is a matter of behaving or living in accord with what matters to someone, not of living in accord with characteristics of hers or categories applied to her that she does not particularly care about." Too often, however, we do not live according to our true values because we are coerced into our traits-based identity. In some cases, the choices that the social context makes available to us preclude us, on account of our traits, from realising those choices we would have valued. In other cases we may not live according to our true values because our decision-making processes may be flawed on account of the fact that we are given limited information due to stereotypes, or because we make decisions based on what is expected from us rather than in accordance with what we truly value. By way of illustration, feminist scholar Wendell, drawing from her own experience in dealing with a chronic disease, has described how once the disease manifested itself she suddenly had a new identity imposed on her – that of disability – and how she felt socially coerced into a life to which she could not relate.

A second major argument put forward is that the relational approach provides a basis for analysing rights which more adequately overcomes the dichotomy between private and public. Nedelsky explains that the idea of boundary between the private and public spheres has been cultivated by individualistic views because they isolate the individual and focus on the oppositional aspect of socialisation. Rights and selfhood are understood therefrom to be some

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kind of private property, which have to be protected from outsiders. Likewise autonomy and collectivities are viewed as standing in a relationship of trade-off, as if the increase in the exercise of the one necessitates the restriction of the other. In her view, this boundary not only fails to correspond to reality, but also presents difficulties when dealing with cases where the public intrudes in previously private areas, such as in situations of dependency or affirmative obligations. If we accept, however, the reality of interdependence and relatedness in human development, then the individuality-collectivity tension will not necessarily be eliminated but the public-private dichotomy will definitely be weakened; the focus shifts from how "to carve out a sphere into which the collective cannot intrude" to how to structure "the relations between individuals and.. collective power so that autonomy is fostered rather than undermined".

A further advantage that proponents of relational accounts put forward and which is linked to the previous argument, concerns the engagement of collective responsibility for the realisation of rights within the private sphere. The main idea here is that mainstream accounts of autonomy recognise as a societal problem only specific relationships, which may entail elements of dependency and coercion, while considering those within the family circle to be a private matter. This standpoint of privileging life in the public sphere over life in the private sphere is, however, gender biased. Apart from individual autonomy from the State, there exists also family autonomy from the State and individual autonomy within the family. If we accept, however, that interdependence is universal and inevitable and that autonomy takes place within a variety of contexts that human life is dependent upon, the dependence that results from biological differences turns into a collective concern in all spheres. In terms of rights, such a normative framework would arguably extend the protection of law to situations of dependency within the family or of the family itself.

At the analytical level, proponents of relational accounts underscore the potential of the relational model to contextualise abstract rights to the particularities of the human subject in any given legal situation; an ability they attribute to its grounding in emotions. Emotions, relational scholars argue, remove autonomy from the notions of objectivity and neutrality which rationality entails. "Emotions focus on our own goals, and they represent the world from the point of view of those goals and projects, rather from a strictly impartial view". In terms of rights, this means that under relational accounts, whether a person leads an autonomous life or

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not should be judged from the person's own perspective and outlook, and not by outside objective criteria. Such an approach seems to address better the call for subjectivity often raised by marginalised groups. In the health care context, for example, for many patients the ability to make decisions about one's life *per se* qualifies, from the perspective of an immobilised person, as an exercise of autonomy; even if from an outsider's perspective it would also require being able to physically carry out one's decisions. This allows for more plasticity within our legal thinking.

Obviously, relational accounts are not without critique. First, as mentioned earlier, their value as analytical tools has been challenged on the basis of their vagueness and their failure to adequately distinguish between the types of socialisation and relationships that promote or undermine the realisation of autonomy and rights, or those that are necessary to promote the necessary skills for autonomy. , p. 32

<sup>159</sup> Ibid., J.Nedelsky, p. 30; see also Nedelsky , *Reconceiving Autonomy*

<sup>160</sup> J. Nedelsky, Ibid., p.8

<sup>161</sup> Supra fn. D.T.Meyers; see also C.Mackenzie, "Relational Autonomy, Normative Authority and Perfectionism", *Journal of Social Philosophy*, vol. 39, no 4, winter 2008, pp. 512-533.

<sup>162</sup> M.Fineman, *The Autonomy Myth: a Theory of Dependency*, The New Press, 2004, pp. 20-22

<sup>163</sup> See M.Fineman, supra fn. pp.36, 47, 51-54



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A second point of scepticism concerns their susceptibility to paternalism. According to critiques of relational accounts, including relationships as a constitutive element of selfhood and rights creates the risk of imposing a sort of perfectionist autonomy leading, thus, to a paternalistic account of autonomy. "It is one thing to say that models of autonomy must acknowledge how we are all deeply related; it is another to say that we are autonomous only if related in certain idealised ways".<sup>168</sup>

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<sup>164</sup> SM.Okin, as in C.A.Ball, cited earlier, p. 354

<sup>165</sup> M.Nussbaum, *supra* fn. 68 p. 12

<sup>166</sup> S.Reindal makes this argument with reference to the idea of independence, "Independence, Dependence, Interdependence: some reflections on the subject and Personal autonomy", *Disability and Society*, Vol. 14, No.3, 1999, pp 353-354

<sup>167</sup> *Supra* fn. , C.Mackenzie and N.Stoljar, pp. 18-19; for a thorough analysis, see in particular J. Christman, "Relational Autonomy, Liberal Individualism and the Social Constitution of Selves", *Philosophical Studies: an International Journal for Philosophy in the Analytical Tradition*, vol 117, no 1/2, Jan 2004

<sup>168</sup> *Ibid.* C. Mackenzie, and N. Stoljar, pp. 18-19; J. Christman, p. 151; for a reply to Christman see C.Mackenzie, "Relational Autonomy, Normative Authority and Perfectionism", *Journal of Social Philosophy*, vol 39, no 4, winter 2008, pp. 512-533

Scholars from primarily the communitarian school of thought have underscored that relational accounts tend to focus too much on interpersonal relationships and do not analyse adequately the way in which a person's identity is shaped by his or her ties with the community and communal groups, for example as a member of a church, school, neighbourhood or even political unions. The sense of belonging to a community, they argue, is also a way of defining a person's identity.<sup>169</sup> This concern is linked to the "right to live in the world" that disability scholars also often address, namely their participation in community life and public affairs. One counter-argument to this is that recent relational accounts do not focus only on strictly familial and interpersonal ties as older accounts did but also consider the ties within the wider social community. Another argument is that a relational view does not stand in the way of also considering a more communitarian view<sup>170</sup>, and that it offers a more adequate normative basis because it puts the emphasis on choice and protects against an uncritical invocation of communities.<sup>171</sup>

## **8. The application of relational theories of autonomy across different areas of law**

While the debate between relational and individualistic conceptions of the self has traditionally preoccupied feminist circles, in particular from within the area of welfare and family law, over recent years the idea of relational selfhood has been gaining increasing scholarly attention beyond feminist scholarship. At times phrased as scepticism towards individualistic notions of selfhood and others as concrete endorsement of relational accounts of selfhood, such literature reflects a discernible scholarly trend to inquire into the dynamics of the relational-individualistic debate. Some of these recent contributions explore the potential of relational theory with a view to securing more effective protection for the rights of marginalised groups.<sup>172</sup> Others, however, follow a broader approach and employ the relational model to analyse particular issues in their legal field, for example administrative rights, liability and compensation under tort

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<sup>169</sup> C.A.Ball, "Looking for a Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law", *Ohio State Law Journal*, vol. 66, pp. 106-175

<sup>170</sup> Ibid.

<sup>171</sup> for a discussion see M.Friedman, "Feminism and Modern Friendship", *Feminism and Community*, (ed)P.A.Weiss; see also L. Barclay, "Autonomy and the Social Self", *supra* fn. , pp 52- 68;

<sup>172</sup> See eg C.A.Ball, "This is not your father's autonomy, lesbian and gay rights from a feminist and relational perspective", *Harvard Journal of Law and Gender*, Vol. 28, 2005, pp. 345-379, who seeks to support the family rights of gay and lesbian people through a relational framework

law, equality issues, and constitutional rights, without focusing on any particular category of rights-holders.<sup>173</sup>

Of much significance in recent discussions has been the emergence of disability rights and their entry into the mainstream legal and political agenda, which has breathed new life into the wider debate about selfhood. The challenge of integrating disability rights in a long-standing individualistic framework, which has been particularly unkind to this category of persons, has sparked a wider scepticism towards mainstream normative assumptions like rationality and independence across the different fields of law.<sup>174</sup> On the one hand, long-standing proponents of relational accounts have been provided with new grounds on which to argue the benefits of their approach by including disability issues in their analysis. On the other hand, disability scholars have shown a growing interest in the notion of relational selfhood, in the hope of securing a more effective framework of protection than the one offered by individualistic accounts. Combined with the challenge that disabilities pose to rationality and independence, feminist and disability perspectives draw close to each other much more than one might initially assume.

An important contribution was made in 1999 by Thomson, who articulated the "relational social model" of disability. He described it as an expansion or re-definition of the classical social model of disability as it takes into account also the psycho-emotional dimension of disability.<sup>175</sup> In addition, certain prominent theorists from the US scholarship have, in recent years, reviewed the American Disability Act and the disability jurisprudence of the US Supreme Court by including relational aspects of autonomy in their understanding of disability rights. In criticising the restricted view of the social model they have explored how certain cases could have adopted

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<sup>173</sup> For a recent collection of essays see *Personal Relationships of Dependence and Interdependence in Law*, (ed). The Law Commission of Canada, University of British Columbia Press, 2002; see also C.M.Koggel, Christine, *Perspectives on Equality: Constructing a Relational Theory*, Rowman and Littlefield, 1998 and "Equality Analysis in a Global Context; a Relational Approach", *Canadian Journal of Philosophy*, 2002, who argues that a relational approach serves equality better as it unmasks hidden forms of oppression embedded in relations as well as helping to reveal the perspective of those affected by inequality, which an individualistic account of resources cannot secure; for a bibliography on tort law issues see L. Bender, "An Overview of Feminist Torts Scholarship", *Cornell Law Review*, Vol.78, Issue 4, 1993, pp. 575-596, who underlines the importance of enriching basic concepts such as harm, injury and liability with feminist perspectives to make them better relate to the outlook of vulnerable categories; see S.J.Brisson, Susan J. 2000, 'Relational Autonomy and Freedom of Expression.' in *Relational Autonomy*, supra fn., pp. 280-293, who applies relational autonomy to examine how hate speech violates a person's autonomy in ways that current restrictions on hate speech leave unregulated.

<sup>174</sup> For a recent collection of essays see *Cognitive Disability and its Challenge to Moral Philosophy*, (ed) F. Kittay and L. Carlson, Wile-Blackwell publ., 2010

<sup>175</sup> While the idea of a relational understanding of disability in terms of stigmatisation is older, the 'contemporary' relational view of disability is attributed to C.Thomas' 1999 publication "Developing the Social Relational in the Social Model of Disability: a theoretical agenda," in *Implementing the Social Model of Disability: Theory and Research*, (eds) C. Barnes and G. Mercer, The Disability Press, 2004, pp. 32-47

a broader perspective had relationships been taken into account.<sup>176</sup>

Nonetheless, a convergence between feminist and disability studies has not yet taken place to the degree that several scholars have been advocating for. Feminist scholars have a tendency to focus on the perspective of the woman-caretaker, while the idea of a relational understanding of rights is still being explored in a rather fragmented manner in disability literature.

An increasing number of important contributions have also come from the health care context, where scholars have underscored the significance of a relational approach in medical ethics. Discussions tend to be centred on the issues of reproductive autonomy and eugenics, rehabilitation and assisted suicide, often also including disability issues, and most recently also the general provision of medical treatment.<sup>177</sup> The main argument here is that the assessment of a person's autonomy which focuses only on the clairvoyance of the person at the moment of the decision is too narrowly constructed. Given the importance of certain life decisions, a relational understanding would be more comprehensive because it would be able to assess a person's choices within the wider social and relational context and take into account a broader range of coercive behaviours. Some of these accounts have sought to verify relational theories against extant case-law and concrete examples taken from their practice, speculating that had specific relationships been taken into account the outcome might have been different.<sup>178</sup>

The potential of the relational model has also attracted the attention of scholars interested in issues of care. Among the most influential contributions here is Kittay's exploration of the notion of relational selfhood when structuring relationships of care, with a particular focus on the ability of a disabled woman to exercise autonomy within relationships from the perspective of dependency.<sup>179</sup>

In the context of this increasing inquiry into alternative perceptions of selfhood, particularly intriguing has been the very recent expansion of relational theory in areas of law, which assume a subject best-described as faceless. Notions like sociability and vulnerability appear thus very

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<sup>176</sup> see for instance A.Satz, "Disability, Vulnerability and the Limits of Anti-Discrimination", *Washington Law Review*, vol 83, 2008 who applies Fineman's theory of vulnerability as a legal basis in addressing disability issues; see also C.A.Ball, *supra* fn. ;

<sup>177</sup> C. McLeod and S. Sherwin, "Relational Autonomy, Self-Trust, and Health Care for Patients Who Are Oppressed," in *Relational Autonomy*, (eds).Mackenzie and Stoljar, pp.259-279; C.McLeod, *Self-Trust and Reproductive Autonomy*, MIT Press, 2002; S. Sherwin, "A Relational Approach to Autonomy in Health Care," in *The Politics of Women's Health: Exploring Agency and Autonomy*, Temple University Press, 1998; C. Ells, M. Hunt and J. Chambers-Evans, "Relational Autonomy as an essential component of patient-centered care", *International Journal of Feminist Approaches to Bioethics*, Vol. 4, No. 2, Fall 2011, pp. 79-101

<sup>178</sup> A.Ho, "The Individualist Model of Autonomy and the Challenge of Disability", *Bioethical Inquiry*, vol 5, 2008, pp. 193-207.

<sup>179</sup> E.Kittay, *Love's Labor: essays on women, equality and dependency*, Routledge publ, 1999.

alien. For instance, contemporary discussions within administrative law have shown support for the idea of restructuring all interactions between citizens and the public service along the lines of relational selfhood. If we replace the currently impersonal and detached relationships between bureaucrat and citizens with relationships of intimacy and interdependence, decision-making processes would arguably become more democratic.<sup>180</sup> Likewise, the lens of interdependence has also recently been employed to analyse the relationship between internet service providers and users as a possible way of restoring the current power-imbalance between the parties.<sup>181</sup>

The normative validity of the arguments put forward by all these different strands of scholarship and their understanding of relational selfhood theories is beyond the scope of this study. What needs to be retained from this discussion, however, is a manifest growing interest among contemporary scholars in the dynamics of individualistic and relational selfhood, and in the applicability and potential of relational autonomy to help us better understand legal issues across very diverse fields within law. Within this growing trend, the case of disabilities has often been pivotal in advancing the idea of replacing the mainstream individualistic account of selfhood altogether.

## **9. Relational accounts of selfhood and international human rights law**

Over recent years, concerns about the limitations of the mainstream individualistic view of the human being and calls for a more inclusive metaphor for human nature have increasingly also been voiced within the human rights literature. As will be analysed in more detail in the course of this thesis, the term “relational autonomy” as such does not often appear. Instead of most interest has been the idea of “universal vulnerability,” a term which has appealed to many human rights scholars. Having as a primary reference the work of feminist scholar Fineman, many contributions seek to read in her theory an alternative framework to enhance human rights protection in particular towards marginalised groups. Whilst there is validity in many of

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<sup>180</sup> L. Sossin, “Law and Intimacy in the Bureaucrat-Citizen Relationship”, in *Personal Relationships of Dependence and Interdependence in Law*, (ed). The Law Commission of Canada, University of British Columbia Press, 2002, pp. 120-153;

<sup>181</sup> See I. Kerr, “Personal Relations in the Year 2000: me and my ISP”, pp. 78-119. See also in the same book W. Flanagan, “Fiduciary Duties in Commercial Relationships: When does the “Commercial” become “Personal”?”, which analyses fiduciary relationships in commercial law through the lens of interdependence, pp. 57-77

the arguments put forward, the position taken here, which will be discussed in more depth below, is that the term vulnerability is by itself not enough to overcome the limitations of individualistic accounts; what is still missing is the notion of relational autonomy.

Following the entry into force of the CRPD, the question of selfhood has been raised in a more targeted manner. Article 12 CRPD, on legal capacity, has shifted scholarly attention to the concept of legal personhood, which by definition touches upon the question of selfhood. Within this context, recent contributions have shown a growing interest in feminist theories of social justice and the perception of citizenship on which they are based,<sup>182</sup> a perception that cuts across relational theories of selfhood. More on this will be said in the course of the second and fourth Chapters. For the time being it suffices to note that even though not all contributions go as far as expressing selfhood and rights in terms of relationships, they are nonetheless based on a common understanding of the need to reformulate rights away from notions of independency and to redefine the role of society in the realisation of human rights.

The position taken here, which will be developed in more detail in the course of the following chapters, is that, at least in theory, relational accounts of selfhood offer a more comprehensive framework, which appears to better serve human rights. Their main strength compared to individualistic autonomy lies in the very inclusive scope of the metaphor of human nature they rely on. By putting the emphasis on emotion, dependence and interdependence they advance an image of the human being that can reach out to everybody, even the most marginalised, such as persons with multiple cognitive and physical disabilities. In the case of such people, for example, the individualistic metaphor can simply not relate to them, no matter how far we stretch the boundaries of rationality and independence. If human rights are meant to be universal, then they also need a rights framework that is at least capable of relating to everybody at the theoretical level.

Beyond this, relational theories promise a framework of rights that overcomes many well-established boundaries that human rights law itself has had difficulty dealing with, such as the public-private divide, the individual-collectivity divide, and positive and negative liberties. In particular, when it comes to positive obligations, they promise a framework that mainstreams positive obligations into rights analysis, unmasks hidden forms of coercion and is capable of

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<sup>182</sup> Among his many contribution, see G. Quinn, "Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD", HPOD Conference, Harvard Law School, 20 February, 2010; for an earlier call to integrate feminist theories in disability studies see S. Wendell, "Toward a Feminist Theory of Disability", *Hypatia*, Vol.4, Issue 2, 1989, pp 104-124

extending their scope even in contexts of dependency.

On the other hand, as an analytical tool the relational account appears to be a work in progress. Even though it promises to be capable of providing a comprehensive framework and of adding plasticity and creativity within our legal thinking, it is also ambiguous in many respects, as described earlier. To address scepticism about the open-endedness of the relational approach, feminist scholars often point out, however, that this is more a question of lack of practical application against concrete case-law than a weakness of the framework itself.

More on this will be said in the course of the following chapters, which will link human rights doctrine with its theoretical roots regarding the self and interpret key legal developments through this lens. The argument will be made that mainstream human rights law has been premised upon an image that has the main features of the individualistic perception of the self, but that subsequent developments reflect a gradual endorsement of the relational perception of the self. Nonetheless the grounding of mainstream human rights law has restricted our construction of positive obligations. The rest of the study will then normatively and empirically investigate the capacity of the relational model to provide more satisfactory answers to long-standing concerns.

## **10. Conclusion**

The purpose of this first Chapter has been two-fold: first, to provide the necessary theoretical background, upon which the ensuing analysis of international human rights law will be based; and second, to place the study of positive obligations and even human rights law itself within their wider theoretical context. The Chapter started by explaining the significance of choosing the right metaphors within the context of the law. Within the international human rights framework the most central metaphor is the image we choose to describe the human being. We then proceeded by exploring the question of the human self and the normative level, focusing on the two mainstream schools that have monopolised contemporary legal thought: relational and the individualistic theories. After tracing the empirical origins of this dichotomy in the Kohlberg-Gilberg debate, we juxtaposed the two approaches to selfhood: the minimally rational, presumably independent and sporadically sociable individualistic subject, with its emotional, dependent and interdependent counter-image.

After analysing the main positions advanced by each theory, we underscored that while the two

accounts have come closer in recent years, there is still divergence between them, in particular on the treatment of relationships as an integral component (or not) of an autonomous life. In elucidating the normative and analytical advantages and disadvantages brought forward by each side, we took note of, amongst other aspects, the narrow normative construction of rights under individualistic accounts and the analytical ambivalence of relational theories. We then outlined the contemporariness of the debate and its increasing expansion into even the least expected legal fields. Then turning our attention to the human rights context, the reader was informed about the position which will be developed in Chapter II, namely that international human rights law has followed this transition from individualistic to relational notions of selfhood and that this is a positive development. The relational account offers a more befitting metaphor for human rights law, even by the mere fact that, at least in theory, its rights framework appears capable of better standing up to the challenge of universality.

The next Chapter will follow up on this discussion by integrating the debate about selfhood with human rights doctrine. The main question we will be inquiring into is the image of the human being that international human rights law presumes and promotes.



## **Chapter II: The image of the human being within international human rights law**

Following the previous discussion, the purpose of Chapter II is to bring the debate about selfhood into human rights law. The central question we will be dealing with is “what image of the human being is posited beneath international human rights law”; or to put it simply, “what kind of a human do we have in mind when we talk about 'human' rights”. Our chronological, and at the same time theoretical, starting point will be the Universal Declaration of Human Rights, which also marks the beginning of contemporary international human rights law. Even though the Declaration was never meant to be a legally binding treaty, it is considered the cornerstone of international human rights law and of enormous normative significance. The finding will be that the Declaration promotes an integrated conception of the human person that views the subject as a 'two-minded' person, a characterisation which does not, however, diminish his/her individuality. The Chapter will explain that this image is the result of the fusion of different philosophies about the human being which guided the drafting of the Declaration.

We will then proceed to trace the vision of the human person underpinning mainstream human rights law. We will first establish that once the codification of human rights into legally binding treaties took place, political circumstances prioritised the enforcement of civil and political rights. As a result, mainstream human rights law has been shaped by frameworks of protection, which prioritise negative liberties and are grounded in the vision of an individualistically autonomous person. We will examine with closer scrutiny this mainstream image in the example of the European Convention of Human Rights, which holds both a chronological and doctrinal primacy within mainstream human rights law.

The focus will then turn to subsequent developments that sought to alter this mainstream image by adding an ever-increasing number of exceptions of vulnerable categories. We will argue that thinking in terms of vulnerable categories is unhelpful and that the proliferation of thematic treaties should be viewed as reflecting a transformation that runs at a much deeper level: it is an increasing acknowledgment of the interdependent dimension of human nature and reflects an effort to humanise and retrospectively complement an unfinished image. The CRPD, which arguably epitomises this process, will be examined in a separate chapter. The Chapter will conclude by juxtaposing with the notion of vulnerability the idea of interdependence, and explain why interdependence is an optimal term to describe this evolution.

## 1. The vision of the human person underpinning the Universal Declaration of Human Rights

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Everyone is entitled to all the rights and freedoms set forth in this Declaration..”

This passage taken from the 1948 Universal Declaration of Human Rights is known to almost every person working with human rights. From a moral perspective human rights are rights which are owed to all human beings by the mere fact that they are humans; without any other circumstances, external forces or State authority.<sup>183</sup> They are rights, the Universal Declaration tells us, which flow naturally from one's humanity, from the intrinsic worth and inherent dignity that every human being possesses.<sup>184</sup> This basic moral conception that permeates human rights law is mainly accredited to 17<sup>th</sup> and 18<sup>th</sup> century European thought, which stressed the sanctity of human existence and fashioned a vision of the person as a natural holder of rights that no State could deny.<sup>185</sup> It finds its reflection in practically every instrument which forms part of contemporary human rights law. All human beings, human rights treaties set out, are born free and equal in dignity and rights and all human beings are entitled to all human rights and freedoms.<sup>186</sup>

Understanding the type of 'human' being on which human rights law is grounded is of course of

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<sup>183</sup> see J. Donnelly, *Universal Human Rights in Theory and Practice*, pp 14-15; for an overview of the different theories see also M. Cranston, Are there any Human Rights? *Daedalus*, Vol. 112, No. 4, Human Rights (Fall, 1983), pp. 1-17;

<sup>184</sup> ICCPR, Preamble; ICESCR, Preamble; see O. Schachter, Human Dignity as a Normative Concept, *The American Journal of International Law*, Vol 77, No 4 (1983), p. 853

<sup>185</sup> R. Peffer, “A Defence of Rights to Well-Being”, *Philosophy & Public Affairs*, Vol. 8, No. 1 (Autumn, 1978), p. 67; for an overview of the developments of international human rights law, see T. Buergenthal, "International Human Rights Law and Institutions: Accomplishments and Prospects", (1988), Vol. 63:1, *Washington Law Review*, pp 1-20; J. Locke, *The second treatise of Government*, T. P. Peardon ed., The Liberal Arts Press, Inc., 1690; for a discussion among contemporary philosophers see also M. Freeman, “The Philosophical Foundations of Human Rights”, *Human Rights Quarterly*, Vol. 16, No. 3 (Aug., 1994), pp. 491-514

<sup>186</sup> See UDHR, Preamble, reiterated in the Preamble of all human rights treaties; also see, for example, the views expressed by the Commission on Human Rights during the drafting process of the ICCPR: “.. the rights of a man appertain to him as a human being and could not be alienated and that they constituted a law anterior and superior to the positive law of civil society”, as in m.J. Bussuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff publ, 187, p. 6. The degree to which contemporary human rights law is grounded in natural rights theories is, however, disputed among scholars, in particular by scholars interested in socio-economic rights. The present passage does not purport to enter into this discussion. It simply states the commonly accepted idea that human rights belong to all human beings by the mere fact of their humanity, independent of whether the underlying moral source of this is divinity, reason, nature and so on.

metaphysical interest for most of us. Unlike animals, we tend to value our status as humans highly. We form a picture of what a good life is and we act to try to realise such pictures.<sup>187</sup> What constitutes 'human', however, is in itself a long discussion.<sup>188</sup>

In the case of human rights entitlements, as Donnelly explains, there are two ways one can understand human nature: a scientific and a philosophical one. From the scientific perspective, any being that is a member of the species *homo sapiens* should be an eligible candidate for human rights protection. Yet the rights which we find in the wide range of international instruments cannot flow from scientific findings alone. Human rights, Donnelly argues, are more than simple claims to secure life. They are entitlements about a good life, a life which is worthy of one's dignity. The biological conception of the human is not capable of generating, by itself, an adequate list of human rights. The vision of humanity or human nature on which our human rights thinking is grounded should, therefore, be understood as a philosophical structure, which bears only loose linkages with scientific findings;<sup>189</sup> while the scientific account lays down the outer limits of human possibility, it is the moral account of humanity which sets the level beneath which nobody should fall.<sup>190</sup> In a way, Donnelly explains, the perception of the human person should be understood in a circular manner; it is both the source from which human rights flow, and the purpose that human rights aim to achieve. When human rights are realised, or in other words when political and legal practice is brought into line with the moral claims of human rights, then the type of individual that is posited beneath human rights law is forged and becomes possible.<sup>191</sup>

## 2. The background of the Declaration

In order to draw a comprehensive picture of the metaphorical perception of the human person on which the 1948 Declaration of Human Rights was based, it is necessary to take a step back and briefly look into the historical context within which this document was drafted. In the

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<sup>187</sup> p. 109

<sup>188</sup> J. Griffin, "Welfare Rights", *The Journal of Ethics*, Vol. 4 No ½, Rights, Equality and Liberty Universidad Torcuato de Tella Law and Philosophy Lectures 1995- 1997 (Jan-March 2000), pp 28-29

<sup>189</sup> see also J. Donnelly, *supra* fn. , pp 14-15; see also J.M. Bergmann, *Das Menschenbild der Europäischen Menschenrechtskonvention*, Vol. 1, Saarbruecker Studien zum Internationalen Recht, Nomos, 1995; L. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States", *The American University Law Review*, (1982) Vol. 32, pp 1-20

<sup>190</sup> *ibid.*

<sup>191</sup> J. Donnelly, *supra* fn. , p. 14

aftermath of two catastrophic world wars, the idea for an International Bill of Human Rights arose, which would secure collective security and ensure that the community of nations would never again experience such massive atrocities. There was a shared conviction among governments and other interest groups that one of the greatest causes of frictions among nations was the lack of uniform world standards for human rights, and a common belief “that recognition of human rights might become one of the cornerstones on which peace could eventually be based”.<sup>192</sup> The initial idea was to prepare a Bill of Human Rights that would consist of a Declaration, a Covenant that would translate the former's principles into contractual obligations and proposals for their implementation. However, the reluctance of certain States to commit themselves to this new type of obligation, disagreements about their substance and the practical complexities of preparing both instruments at the same time, eventually led to the prioritisation of the Declaration. Since it was not meant to have a legally binding character, its successful formulation seemed easier to achieve.<sup>193</sup>

However, drawing up a document of “universal standard” which knew no precedent and which would gain wide political and ideological acceptance in order to avoid past failures in securing peace proved an onerous undertaking. Ideally, it had to be a “perfect” document. One which, after taking into account all of “the world's existing constitutions and rights instruments”, would provide a common ground to “the most fundamental and widely shared principles to have emerged over humanity's long, ongoing process of reflection on freedom”.<sup>194</sup> Once this idea was put into practice and the writing process started, the ambition for the “perfect” text which would achieve homogeneity among widely separated philosophies started fading away. Not only were the disparities among the represented nations wide, but the drafters themselves came from different philosophical and cultural backgrounds, represented different rights traditions and did not even speak a common language.

As a practical solution to the lack of resolution of ongoing theoretical debates, it was therefore suggested to move forward with the project even if no philosophical consensus could be reached on the moral reasons underlying each human right. The Declaration would be universal not because of its affirmation of “one and the same conception of the world, of man” but in a more practical sense: it would be definite enough to provide guidance to nations, but also

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<sup>192</sup> Ibid., p. 31

<sup>193</sup> J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, 1999, p. 17

<sup>194</sup> For an insightful reading of the drafting process M.A. Glendon, *A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, 1st ed., 2001 (hereafter *A World Made New*) p. 56

flexible and general enough to apply to all principal philosophies, cultural systems and legal traditions, without showing preference to any of them. It should also be capable of embracing modifications.<sup>195</sup> This basic view of the Declaration as a “composite synthesis”, which would provide a framework for all ideologies without, however, reflecting any one of them in particular, guided the whole of the drafting process<sup>196</sup> and also sheds also into the integrated conception of the person which is discernible through the text of the Declaration.

### 3. A “two-minded” person

Thus going back to the question about the vision of the human being projected by the Declaration, it should be of no surprise if the answer is that the Declaration does not promote one clear view of human nature and neither does it design its subject on the basis of any firm human attributes. By adopting a style which is at times abstract and at times very practical and refers to concrete quotidian situations, it projects an image of the individual who is on the one hand highly symbolic but, on the other, experiences life in a very pragmatic and earthly manner. One of the most apt descriptions for this person was provided by the Chinese delegate Chan, who used the term of the “two-minded” person. This is the term that will be used to describe this person here. In fact, nothing about the person of the Declaration is one-sided.

From a physiological perspective, the Declaration tells us that the human person is “everyone”. In various provisions the Declaration points to diverse aspects of the human condition. The purpose of such references is not to constrain its applicability, but rather to visualise what this “everyone” could look like. The Declaration does this in a very inclusive manner. It tells us that this person can be a man, a woman and a child. It may be a person who is young, old, pregnant, sick or with a disability.<sup>197</sup> In essence, all variations of the human condition are equally included. The person of the Declaration is thus a sort of generic human being, who integrates in a very

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<sup>195</sup> Ibid. ; see also M.A. Glendon, “Reflections on the UDHR”, *First Things* 82 (April 1998), pp 23-27. On the normative significance and transcultural influence of the Declaration, see J. Morsink, *supra fn.* , pp 19-20 and pp 21-28 explaining the circumstances of the final abstentions; by the same author, see also *Inherent Human Rights: Philosophical Roots of the Universal Declaration*, University of Pennsylvania Press, 2009

<sup>196</sup> M.A. Glendon, *A World made New*, *supra fn.* pp. 67 - 69; J. Morsink underlines that “throughout the drafting process repeated pleas were made to draw up a declaration that was acceptable to all the participating states. This was no empty request, for.. thirty-seven of the member states stood in the Judeo-Christian tradition, eleven in the Islamic, six in the Marxist and four in the Buddhist tradition”. Morsink goes on to cite statements during the drafting process that the Declaration should “take the different cultural systems of the world into account” and that the “different ideologies need to find common ground”, *supra fn.* , p. 21

<sup>197</sup> UDHR, Preamble, Arts. 1, 25

earthly manner all forms of human difference.

From a moral perspective, the person of the UDHR is a being who has two minds. Already in the opening sentence the Declaration tells us that every human being is naturally endowed with both “reason” and “conscience”.<sup>198</sup> The *travaux préparatoires* reveal that notwithstanding the influence of Enlightenment theories on some, the drafters did not understand “reason” in the sense of rationality. The Declaration never purported to promote the Kantian ideal of humanity nor did it ever condition a minimum degree of rationality as a prerequisite for one's humanity. What the drafters meant to refer to with the term “reason” was actually the idea of responsibility.<sup>199</sup> In the aftermath of two catastrophic world wars, nobody wished to empower the individual with a list of “selfish” rights one could abuse. Instead they preferred a more balanced view of the human as a being, who uses his or her freedom responsibly and sensibly.<sup>200</sup> As far as the term “conscience” is concerned, the *travaux préparatoires* also reveal that within the context of communicative difficulties and linguistic disparities, this was an unfortunate translation of the Chinese equivalent of the notion of “compassion” or “consciousness of one's fellow humans”.<sup>201</sup> In other words, the human person is guided not only by reason but also by feelings such as sympathy and care for others. It is a person who is responsible but also feels related to his or her fellows, who is both reasonable and empathetic, sensible and caring; a balanced two-minded person.

The Declaration also underlines that this two minded-person is not an isolated, sovereign individual. It is a person who is defined by or through relationships to other humans beings, without, however, losing his or her individuality.<sup>202</sup> It is a person who is naturally sociable but also “uniquely valuable” at the same time. This interpretation is supported by the negotiation archives, which reveal the heated discussions among the drafters in their effort to find a common ground between contractarian and communitarian philosophies about human nature. The person of the Declaration should not be a Robinson Crusoe, it was argued, nor a being consumed by a totalitarian State.<sup>203</sup> This broad view of personhood and effort to strike a balance between individuality and communitarianism is reflected throughout the Declaration. For instance, the Declaration avoids the use of the term “individual” but chooses “person” instead, in

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<sup>198</sup> UDHR, Article 1

<sup>199</sup> see J. Morsink, *supra* fn. , pp 282-283, 296- 302;

<sup>200</sup> For the relevant discussion during the drafting process see J. Morsink, *supra* fn. , pp 282-283;

<sup>201</sup> M.A.Glendon, *A world made New*, *supra* fn., p. 67

<sup>202</sup> *Ibid.* p. 227

<sup>203</sup> *Ibid.* p. 42

order to avoid contractarian and individualistic associations. In addition, while several provisions of the Declaration carve out an area of human freedom that neither government, private groups, nor individuals may touch,<sup>204</sup> at the same time the Declaration places the person within a human society, where he or she is expected to act towards others in “a spirit of brotherhood”.<sup>205</sup> It also mentions that it is in “the community in which alone” the free development of personality is possible, to which every person has responsibilities.<sup>206</sup> It is thus the image of a person, who is rooted in and defined by the human community and who is under an obligation to abide, at least in overt behaviour, by the values and principles of the political and moral order, but whose intrinsic value remains intact.<sup>207</sup>

The Declaration further emphasises that the natural sociability of the human being should not be understood only in terms of duties of social compliance, but that personhood is also shaped through fulfilling relationships.<sup>208</sup> Again, the Declaration strikes a balance between autonomous existence and interrelatedness. For instance, in different places the Declaration mentions that the rights should be directed to “free and full development of human personality”.<sup>209</sup> At the same time however it counterbalances any atomistic perceptions of the human being by recognising that every person is interrelated and shapes his or her identity through kinship and wider societal ties.<sup>210</sup> These include, for example, the ties developed with one's family members,<sup>211</sup> but also through participation within wider societal contexts, such as labour unions<sup>212</sup>, the communal, cultural and scientific life<sup>213</sup>, political affairs<sup>214</sup> or membership of religious groups.<sup>215</sup>

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<sup>204</sup> See, for instance, the rights to home, privacy and correspondence, the right to form opinions without interference, to choose religion etc. See also the often cited 1954 Investment Aid case of German Constitutional law, “The image of the man... is not that of an isolated, sovereign individual. On the contrary, the Basic Law has resolved the tension between individual and society in favour of coordination and interdependence with the community without touching the intrinsic value of the person... The individual has to accept those limits on his freedoms of action which the legislature imposes to cultivate and maintain society. In turn, such acceptance depends upon the limits of what can reasonably be demanded in a particular case, provided the autonomy of the person is preserved.” as in D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, 1989, p. 250

<sup>205</sup> See D. Kommers, “The Jurisprudence of Free Speech in the US and Federal Republic of Germany,” *Southern California Law Review*, 53 (1980) p. 677 as in D. Kommers, *supra* fn. , p. 246

<sup>206</sup> UDHR, Article 29

<sup>207</sup> *Ibid*; *supra* 47

<sup>208</sup> For a collection of draft statements to this effect, see Morsink, *fn.* pp. 247-248

<sup>209</sup> UDHR Articles 26, 22

<sup>210</sup> UDHR, Article 29

<sup>211</sup> UDHR, Article 16

<sup>212</sup> UDHR, Article 23

<sup>213</sup> UDHR, Article 27

<sup>214</sup> UDHR, Article 21

<sup>215</sup> UDHR, Article 18

In a similar vein, the Declaration projects the vision of a human being who is to some degree self-reliant, while acknowledging at the same time that every human being is in need of varying degrees of external societal assistance. For example, the UDHR person is a person who owns property, has a home and seeks to earn his or her living and be materially independent by means of employment.<sup>216</sup> On the other hand, the Declaration does not promote the image of an autarkic individual because it recognises human dependencies. For instance, the Declaration underlines that there are circumstances, such as sickness, poverty or unemployment, which lie beyond one's control and create needs for increased societal support.<sup>217</sup> Apart from those more specific cases, which could be considered to be exceptional, the Declaration recognises that a certain degree of dependency is inherent in all human beings. For instance, it provides for a series of socio-economic entitlements, such as adequate health services, paid holidays, and an appropriate education system which are applicable to all.<sup>218</sup> In addition, in one of the boldest provisions, it stresses that all humans are in need of social security.<sup>219</sup> The person of the Declaration is thus not a sovereign and self-reliant person, but a naturally dependent individual, with needs and vulnerabilities, who values, however, self-realisation and seeks assistance in order to live up to his or her potential and view of a good life.

#### **4. The main message of balance and diversity**

Undoubtedly, further reading may be able to reveal more traits to add to these fundamental moral dimensions of personhood. Nonetheless, no matter how many characteristics we read into the person of the UDHR, it is safe to assume that they will always stand in equilibrium with a counterpoise. This is after all the main message that the Declaration was trying convey, namely to construct a framework in which every culture would be able to find its contributions and influence without, however, providing a full account of any one in particular.<sup>220</sup> It is thus not surprising that different scholars were able to read into the UDHR's person the simultaneous and harmonious co-existence of features that are normally found in theoretically opposing

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<sup>216</sup> UDHR, Article 13

<sup>217</sup> UDHR, Article 25

<sup>218</sup> See the drafting process of socio-economic rights in M.A. Glendon, *supra* fn. , pp 156-189; see also J.Morsink, *supra* fn. , pp 202-210

<sup>219</sup> UDHR, Article 22;

<sup>220</sup> M.A. Glendon, describes this as a sort of “pick-and-choose” or “cafeteria style” approach to human rights, *supra* fn. , p. 164



ideologies; for example, a person who has both egalitarian and communitarian characteristics, who is contractarian and communitarian at the same time.<sup>221</sup> This does not mean that the Declaration framework of rights has escaped criticism. However, as has been rightly argued, most criticism appears to stem not from the Declaration's hostility towards certain philosophical accounts and cultures, but rather from a disappointment that these were not accommodated to a great enough extent.<sup>222</sup> Moreover, the enduring significance of the Declaration and its wide normative influence is often used as proof of its capacity to accommodate different ideological backgrounds. In any case, however, when talking about the human person promoted by the Declaration it is important to distinguish between what the Declaration actually tells us about this person and how his was subsequently translated into practice, an issue which will be examined below.

What is important to remember for the purposes of this study is that out of this ideological fusion, which was attributable primarily to practical reasons, a highly integrated, balanced and pluralist vision of the rights-holder emerged. It is a person who works with two minds; one of reason, one of compassion and emotion. It is the image of a responsible and caring human who is unique and interrelated at the same time. The Declaration does not promote an isolated, sovereign individual, but places the human being within a human community and a web of relationships that shape his or her identity, without denying, however, his or her individuality and need for self-realisation and development. It is a person who is dependent on external assistance in order to realise his or her own potential. In other words it is a highly encompassing conception of human nature, which is at times vague at times very practical and earthly, and which occasionally awkwardly balances <sup>223</sup> between different ideologies, but eventually synthesises and embodies diverse philosophical accounts without betraying its equilibrium.

## **5. Developments subsequent to the Declaration**

Despite this very pluralistic and inclusive conception of the human person that the Declaration

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<sup>221</sup> D. Kommers, *supra* fn. , p. 246 who describes that the individual of the Declaration is contractarian and communitarian at the same time; likewise see the drafting process on the “duties” towards the community and other individuals, as in J. Morsink, *supra* fn. , pp. 241-268

<sup>222</sup> J. Morsink who, amongst others, describes with reference to the abstentions how the Declaration was too socialist for the liberals and not socialist enough for the former, *fn.* pp. 21-27

<sup>223</sup> See for instance the linguistic misunderstanding about “conscience” described above.

placed in the normative foundations of international human rights law, political priorities paved the road for subsequent legal developments which – to the disappointment of the UDHR framers – were not quite what they had hoped for.<sup>224</sup> From a legal perspective, this has been unfortunate because it has led to prioritisation of negative liberties and civil-political rights, thus hampering the socio-economic frameworks from reaching their potential.

In particular, when the time came to translate the Declaration's "common standards of achievement" into legally enforceable obligations there was an apparent change of mind at the UN level. As mentioned earlier, the initial plan was to accompany the Declaration with one Covenant, which would lay down State obligations correlating to the pronouncements of the Declaration and suggest measures of implementation.<sup>225</sup> In 1951, however, and while the Commission of Human Rights was working on the draft for this new treaty, the General Assembly overturned, in a highly controversial manoeuvre, its earlier resolution and decided that there should be two separate documents, one for civil-political and one for socio-economic rights.<sup>226</sup> The formal justification brought forward was of a legal nature and concerned "the difficulties which may flow from embodying in one Covenant two different kinds of rights and obligations".<sup>227</sup> As a midway solution to underline the significance of both categories of rights the two Covenants would open for signature simultaneously. Contemporary scholarship, however, questions the legal soundness of those arguments and regards Cold War politics and the pressure exercised by the Western-dominated Commission as the real driving force behind these amendments.

This separation was soon extended to the means of implementation. Contrary to the original plan, a complaints mechanism was drawn only for the ICCPR, but not for the ICESCR,<sup>228</sup> a restriction which subsequently obstructed the latter's potential to contribute more dynamically to the human rights discourse.<sup>229</sup> Eventually, it took 18 years from the proclamation of the

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<sup>224</sup> M.A Glendon, *supra* fn.

<sup>225</sup> General Assembly, Resolution 421 (V) of 4 December 1950; *Yearbook of the United Nations*, 1947-48, p. 526.

<sup>226</sup> General Assembly, Resolution 543 (VI) of 5 February 1952, "Preparation of two Drafts International Covenants on Human Rights", UN.doc; see A. Eide, "Economic, social and cultural rights as human rights", p. 9; see also M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, Hart publ., 2009, pp 26-27; see also P. Alston, "US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy", *The American Journal of International Law*, Vol. 84: 2, (April 1990) p. 374;

<sup>227</sup> Economic and Social Council, Resolution 384 (XIII) of 29 August 1951, Part C

<sup>228</sup> See Report of the Commission on Human Rights, 10th Session, 18 U.N. ESCOR Supp. (No. 7) at 9-25, U.N. Doc. E/2573 (1954) (reporting on Commission proceedings regarding implementation); see in particular P. Aston, "Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights", *Human Rights Quarterly*, Vol. 9, No. 3 (Aug., 1987), pp. 332-381; see D.J. Whelan, *Indivisible Human Rights: A History*, University of Pennsylvania Press, 2010;

<sup>229</sup> Among the wide literature on the secondary status accorded to economic, social and cultural rights see in

UDHR before the two Covenants were formally adopted, their completion being hampered by “the Cold War, the developing US opposition to the principle of international human rights treaties, and the scope and complexity of the proposed obligations”.<sup>230</sup>

While the politicisation of the human rights discourse arguably delayed developments at the UN level, processes at the regional level were much faster. In the aftermath of a catastrophic second world war, a ruined Europe was eager to rebuild its countries and restore democratic order on the basis of the rule of law and respect for individual freedoms.<sup>231</sup> In 1950, only a short two years after the proclamation of the Declaration, the European Convention on Human Rights was adopted.

Its rather short text, written out the UN Human Rights Commission's draft notes, would be the first treaty to give legal content to the UDHR. Since there was no precedent of a similar enterprise anywhere in the world, its drafters had rather modest aspirations. Their basic idea was not to legalise the whole Declaration but to at least start from somewhere.<sup>232</sup> They agreed “without difficulty that the collective enforcement should extend solely to rights and freedoms: “(a) which imposed on the States only obligations 'not to do things'... it followed that so-called economic and social rights should be excluded, at least to begin with”.<sup>233</sup> Their fulfilment appeared to condition sustained efforts from the part of the States and risked putting them off.<sup>234</sup> It would also be the first instrument to set up a collective enforcement system for human rights which provided for an individual complaints mechanism against States.<sup>235</sup>

The dichotomy of the Covenants, the setback in the completion of the International Bill of Human Rights and the emergence of high-profile enforcement systems (first of the ECtHR and subsequently the UN Human Rights Committee and the Inter-American system of Human

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particular D. Beetham, “What Future for Economic and Social Rights?”, *Political Studies*, (1995), Vol 43, Issue Suppl 1, pp 41- 60

<sup>230</sup> H Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals-Text and Materials* (Oxford University Press, 2nd ed., 2000; 3rd ed., 2008, p. 244 as in M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, Hart publ., 2009, p. 27;

<sup>231</sup> See in particular P.H. Teitgen, “Introduction to the European Convention on Human Rights”, *The European System for the Protection of Human Rights*, eds. R.St.J.Macdonald, F.Matscher, H. Petzold, Martinus Nijhoff publ., 1993, pp 3-14;

<sup>232</sup> Ibid. p 10

<sup>233</sup> Ibid; see also G. Marston, “The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950”, *The International and Comparative Law Quarterly*, Vol. 42, No. 4 (Oct., 1993), pp. 796-826; A. Moravcik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe”, *International Organisation* (2000), Cambridge University Press, pp. 217-252

<sup>234</sup> R.A. Lawson, “Positieve Verplichtingen onder het EVRM: Opkomst en Ondergang van de "fair balance " test, Deel 1”, *NJCM*, pp 558-560;

<sup>235</sup> Ibid. p. 3

Rights)<sup>236</sup> which embraced only some of the UDHR principles were not without normative significance. “When the Declaration eventually woke up”, Glendon describes, “it was like Rip Van Winkle, who went to sleep for twenty years and awakened to find himself in a world from which his friends had disappeared, and where no one recognized him.”<sup>237</sup> It meant that human rights law had taken a clear course towards the direction of a negative-liberties approach to rights. Thus going back to the question of the conception of the person underpinning international human rights law, this has by large been shaped by 'mainstream' rights frameworks, such as the ECHR, the AmCHR and the ICCPR, which have dominated the human rights discourse to the detriment of their lower-profile socio-economic equivalents.<sup>238</sup>

## 6. The ECHR person as the representative of mainstream international human rights law

Whilst the metaphor of the human subject underpinning mainstream human rights law has been shaped by three major legal systems that have dominated the human rights discourse over the past decades, for several reasons the ECHR framework offers a more appropriate basis for analysis compared to the ICCPR or the AmCHR. First, the ECHR holds chronological primacy in transcribing the UDHR principles into contractual obligations. By the time, for instance, that the ICCPR and the AmCHR entered into force, the Declaration person already counted almost 30 years of existence in theory and practice through the ECHR framework. Second, because of the ECHR model's normative authority and enduring significance, given that it is considered worldwide to be the most influential and successful framework of transnational human rights protection.<sup>239</sup> Third, because the ECtHR has produced an extensive body of jurisprudence which addresses a wide range of human rights issues. It is, therefore, capable of providing a more holistic picture compared to the more modest work of the HRC or the jurisprudence of the AmCHR, which has been thematically limited to specific human rights abuses mainly due to the

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<sup>236</sup> American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, that is also framed in terms similar to the ICCPR model

<sup>237</sup> A. M. Glendon, *supra* fn.

<sup>238</sup> See O'Conneide, “Extracting Protection of the Rights of Persons with Disabilities from Human Rights Frameworks”, *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, (eds). O.M. Arnadottir and G. Quinn, 2009, Martinus Nijhoff publ., . pp 168-171

<sup>239</sup> For the influential role of the ECHR see in particular J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2<sup>nd</sup> ed., Manchester University Press, 1993; for a more recent authority see O.d.Frouville, “The influence of the European Court of Human Rights' Case-Law on International Criminal Law of Torture, Inhuman and Degrading Treatment”, *Journal of International Criminal Justice*, (2011) 9 (3): 633-649.

type of complaints it receives. Finally, given their strong conceptual affiliations,<sup>240</sup> the type of person that emerges out of the ECHR may easily be extended to those frameworks as it shares some common basic features.

In view of the above analysis it is therefore reasonable to argue that the ECHR person is highly representative of the type of person underpinning mainstream human rights protection.

## **7. The norm: A presumably 'autonomous' individual**

The decision of the ECHR framers to pick out and apply only some principles out of the UDHR list, which in their view met the identified criteria, meant that a partial mismatch between the ECHR person and the UDHR prototype was going to be inevitable.

At first reading, the departure point of both texts is undisputedly the same. The human person, the ECHR sets out, is “everyone”. Unlike the Declaration, the ECHR does not go into, however, many details about the condition or daily life of this person. The abstract, minimal style of the Convention in laying down rights results in this “everyone” remaining rather faceless throughout. It is noteworthy, however, that where more humanising features appear they are treated primarily as exceptions. In the main, they are causally linked to a restriction of rights, rather than grounds for enhanced protection. This confers upon them a rather negative moral undertone. For instance, Article 5 on arbitrary detention lists drug and alcohol addiction, unsoundness of the mind, vagrancy and suffering from infectious diseases as possible grounds which may justify a person's confinement and deprivation of liberty. While in practice the ECtHR has interpreted this by-now outdated provision<sup>241</sup> in a very restrictive manner, the principal laid out is still not as embracing of human weaknesses as the mentality evident in the UDHR.

From a theoretical perspective, almost any account of rights which focuses on civil-political rights, as the ECHR does, is almost automatically associated with notions of independence and autonomy within the meaning of self-sufficiency and individualism. The basic idea is that frameworks like these are grounded in the negative conception of freedom and therefore

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<sup>240</sup> For their interrelatedness see C.Jonathan, *La Convention Europeene des Droits de l'homme*, 1989 as in M. Nowak, *UN Covenant on Civil and Political Rights, CCPR commentary*, 2<sup>nd</sup> revised edition, N.P. Engel publ., 2005, p. XXII

<sup>241</sup> To compare, the equivalent Article 7 on the right to liberty of the American Declaration, adopted almost twenty years later, and Article 9 ICCPR, adopted almost twenty-six years later, have a more neutral wording.

primarily interested in the degree to which individuals suffer from external interference. They project rights as shields which are intended to protect the individual against totalitarian regimes that show no respect for and threaten to consume a person's uniqueness.<sup>242</sup> They are therefore structured around the archetype of an isolated, sovereign and self-governed person, who realises freedom by being left alone from the oppressive State, an image that relates more to the individualistic perception of the self described in Chapter I.

While there is some undisputed truth in this, as well as in the liberal origins of the ECHR, jumping to such a stereotypical conclusion on this basis alone would produce an incomplete picture of the human rights person. It would deny the existence of a continuously expanding body of jurisprudence which has complemented the ECHR's (as well as the ICCPR's and ACmHR's) interpretation of human nature. In particular, in the case of the ECHR, which is the focus here, it has been rightly argued that the jurisprudence does not follow one specific ideology. Depending on the issue at stake the Court may have recourse to different theories, without necessarily feeling bound by its approach in previous cases. Next to liberalism one may therefore discern within the ECHR framework the influence of diverse legal philosophies.<sup>243</sup> The question therefore of the nature human person promoted by the ECHR and, consequently, the mainstream human rights system merits closer examination.

The most thorough analysis on the conception of the human person under the ECHR has been undertaken by German scholar Bergmann. His insightful work draws from the wider discussion about the "image of the human person" ("Menschenbild") that has guided the German Constitutional Court in several of its landmark rulings. His analysis, the main positions of which the present study subscribes to, will be relied upon here.

#### **a. The main traits characterising the ECHR rights-holder**

Bergmann's principal position is that the person posited beneath the ECHR is a fundamentally autonomous and autarkic individual, whose free will is guided, however, by a strong sense of

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<sup>242</sup> See E. Palmer, *Judicial Review, socio-economic Rights and the Human Rights Act*, Hart Publishing, 2007, p. 4 who notes that "The phrase 'possessory individualism' is generally attributed to the political theorist CB McPherson, whose influential book, *The Critical Theory of Possessive Individualism* (Oxford, Clarendon, 1962) assigned primacy to liberty as non-interference and questioned the potential for liberal theories of justice to protect a wider range of basic human interests than those traditionally afforded the status of legal protection in Western democracies." ; see also O' Cinneide, *supra* fn. p. 168

<sup>243</sup> See in particular K. W. Weidmann, *Der Europäische Gerichtshof für Menschenrechte: auf dem Weg zu einem Europäischen Verfassungsgerichtshof*, 1985

'democratic' responsibility and who feels bound by the rules of the democratic society to which he/she subscribes. Seen as such, the individual stands precisely in the middle between individualism and collectivism. In case of doubt, however, the scale weighs in favour of individualism.<sup>244</sup>

In particular, Bergmann argues that, no matter which disciplinary perspective we apply<sup>245</sup> and no matter how pluralistic and multidimensional the Court's understanding of rights may be, any interpretation has the same starting basis and departure point, namely the fixed image of a free, autarkic and 'autonomous' individual.<sup>246</sup> This autonomy, Bergmann describes, should be understood as threefold. First, as spiritual autonomy, in the sense that the person is able to form opinions independently, without unwanted external influences. Second, as independence and control over one's own affairs. Third, he argues, as materialistic self-sufficiency and self-reliance.<sup>247</sup> It is thus a being who cannot be manipulated, does not need assistance, is progressive, creative and whose primary purpose is to develop his or her personality by overcoming his or her own imperfections. In this respect, the human person emerges less as a complete person but as a "potential personality".<sup>248</sup>

Bergmann explains, however, that the autonomy of the ECHR person is not identical to the Kantian ideal of absolute self-determination. The human of the ECHR is a being, whose freedom is circumscribed by the rules and principles of a 'democratic society' and who is bound to his or her community.<sup>249</sup> In certain areas of life, in particular those that deal with community life such as press or education, his or her autonomy is guided by a sense of tolerance and societal responsibility.<sup>250</sup> This 'ideal democrat', who believes fundamentally in the rule of law, is an open-

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<sup>244</sup> M.Bergmann, *Das Menschenbild der Europäischen Menschenrechtskonvention*, Nomos publ., Vol. I of Saarbrücker Studien zum Internationalen Recht, 1995, pp. 88-93, 111-115, 232-245, 304-305 For a wider discussion about "the image of the human person" (Menschenbild) referred to by the German Constitutional Court see in particular the work of P. Habermas, *Das Menschenbild im Verfassungsstaat*, Duncker and Humblot GmbH Buch, 2008; For a more recent study see also K.H.Auer, *Das Menschenbild als rechtsethische Dimension der Jurisprudenz*, Lit publ., 2005, pp. 213- 222 refer to the ECHR person

<sup>245</sup> Bergmann traces back and analyses the conception of the human person underpinning the ECHR through the lens of the history of rights, theories of fundamental rights, the philosophy of rights and the argumentation of the Court itself.

<sup>246</sup> Ibid. pp. 88-93, 111-115, 232-245, 304-305

<sup>247</sup> Ibid. p. 111

<sup>248</sup> Ibid. p. 114

<sup>249</sup> Ibid. p. 93

<sup>250</sup> Among the various cases supporting this view see, for example, *Jersild v. Denmark*, Appli. no. 15890/89, on freedom of the press and the responsibilities of a journalist towards the public; see also *Handyside v. the United Kingdom*, App. no. 5493/72, on freedom of expression and the duty of society to tolerate ideas of others, even those that may seem shocking or offensive; see also *Folgerø and Others v. Norway* [Grand Chamber], no. 15472/02 on right to education, in which the Court balanced the parents' autonomy in determining their children's upbringing with the duty to respect cultural diversity in the classroom.

mindful and understanding person who accepts as equals the persons surrounding him or her. However, there is no requirement for this person to exhibit altruism, compassion or helpfulness – or in any case no more than what the functioning of a democratic society would require.<sup>251</sup>

Within this framework of a properly governed society, the person of the ECHR strives to find the right balance, and harmonise a maximum sphere of self-determination with a minimum degree of heteronomous pressure.<sup>252</sup> Seen as such, the ECHR person stands, at least as a matter of principle, precisely on the middle line between individualism on the one hand and collectivity on the other; as an autonomous person and as member of a democratic society, respectively.<sup>253</sup> In many rulings, however, and if in doubt, the Court has attached more significance to self-sufficiency than alternative characteristics.

In view of all this, Bergmann concludes that labelling the ECHR person as the absolutely self-determining individual of liberalism is not accurate, because neither the Convention nor the Court have consistently followed the classical conception of rights as negative freedoms.<sup>254</sup> However, given that they have maintained the conceptual separation of State and society, i.e. a basic liberal principle, they presume the Convention rights to be primarily defensive rights against the intrusive State. This analytical scheme is only exceptionally abandoned. As a result, even if the Court does not apply the liberal view of rights unequivocally, it nonetheless uses the liberal archetype of the 'autonomous' person as the departure point of any interpretation.<sup>255</sup>

## **b. The presumably 'autonomous' individual as the mainstream metaphor in human rights law**

Bergmann's well-supported and comprehensive analysis suggests a balanced image of the human being, which bears some common features with the UDHR prototype but is not identical. Bergmann carves out of the combination of the Convention and case-law a person who bears the basic characteristics of individualistic autonomy, albeit the more contemporary version (i.e.

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<sup>251</sup> Bergmann, *supra* fn. , pp.113-114

<sup>252</sup> Ibid. p. 305

<sup>253</sup> Ibid. p. 251

<sup>254</sup> Ibid. pp. 106-107, 304

<sup>255</sup> In exploring the rights theories underlying the Court's interpretation, Bergmann further argues that the Court uses the theory of institutional rights only in certain areas (eg family, press), makes use of the theory of values and the democratic-function theory only when referring to the "democratic society" and that it excludes altogether the applicability of the theory of social rights. In all cases, however, he concludes, the liberty theory appears as the departure point. See also Weidmann, who reaches the same conclusion in *Der Europäische Gerichtshof für Menschenrechte: auf dem Weg zu einem Europäischen Verfassungsgerichtshof*, 1985, p. 134; see also O' Cinneide who makes the same point, p. 170



minimally rational, preferably independent and sporadically sociable). Thus, it is a person capable of critical thinking and sensible but not in the detached Kantian sense. He/she is also understanding and tolerant, though emotions of care and intimacy, as required by relational accounts, are either absent or under -control. Likewise, this person is presumed to be materially independent and only exceptionally asks for this kind of external support. As far as the social environment is concerned, the Convention person is not an isolated individual but lives within a democratic social context, to which he/she is bound and interacts with social responsibility. They are the ideal democrat, who underpins most of the Court's cases, without losing, however, his or her individualistic roots. This means that a degree of autonomy, within the individualistic meaning of self-sufficiency and independence, is always assumed to pre-exist.

Once tested against the Court's case-law, this image is able to live up to an interpretation of rights which is inclined to secure a maximum sphere of individual freedom, for instance with respect to the rights to privacy or personal liberty<sup>256</sup>, apply a minimum degree of pressure in the areas that affect community life, like in cases of freedom of expression<sup>257</sup> or education<sup>258</sup>, but is very sparing with respect to entitlements to benefits.<sup>259</sup>

Bergmann's analysis of the image of the ECHR rights holder may be extended to other mainstream frameworks, such as the AmCHR and the ICCPR, given the interrelatedness and conceptual affiliation between these systems of protection.<sup>260</sup> This does not suggest the denial of some important substantial differences in the interpretation of the rights they deal with.<sup>261</sup>

<sup>256</sup> For a case-law analysis on how the Court has established the right to personal identity, personal information, personal sexuality and private space on the basis of Article 8 (right to respect for privacy and family life) see in particular R. Clayton and H. Tomlinson, *The Law of Human Rights*, 2n edition, Oxford University Press, 2009, par. 12

<sup>257</sup> Among the most characteristic examples see also *Garaudy v. France*, Appl no 65831/01, in which the Court held that freedom of expression is compounded by democratic values and does not entitle a person to publicly deny established historical facts as grave as the Holocaust.

<sup>258</sup> Compare for instance *Valsamis v. Greece* (Appl. No 21787/93), *Efstratiou v. Greece* (24095/94) and *Campbell and Cosans v. the United Kingdom* (Appl. No: 7511/76, 7743/76) on the Court's struggle to strike a balance between the applicant's right to self-determination, on the one hand, and respect for pluralism within education and society on the other.

<sup>259</sup> For a very recent reiteration of this conservative approach see *Yordanova and others v. Bulgaria*, Appl. no. 25446/06, Judgment of 24 April 2012, on the right to housing under Article 8 in which the Court emphasised that: "The above does not mean that the authorities have an obligation under the Convention to provide housing to the applicants. Article 8 does not in terms give a right to be provided with a home (see, Chapman, cited above, § 99) and, accordingly, any positive obligation to house the homeless must be limited (see O'Rourke v. the United Kingdom (dec.), no. 39022/97, ECHR 26 June 2001). However, an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases (ibid.; see, also, mutatis mutandis, *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009)" also *N. v. the United Kingdom*, [Grand Chamber], in which the Court held that entitlements to social and medical benefits may only in highly exceptional cases reverse a severely sick person's expulsion, paras 42-43;

<sup>260</sup> See in particular M. Nowak, *supra* fn. , pp XXII- XXIII;

<sup>261</sup> For a comparison between the HRC and ECtHR see M. Forowicz, *The Reception of International Law in the*

The argument that is made here relates to their conception of the human person alone.

To take as an example the ICCPR (similar to the ECHR) which in its origins has a negative-liberties model of rights which, as such, relates to notions of self-determination and self-sovereignty. The HRC has, however, with time gone beyond the text of the Convention and has recognised a positive dimension in all rights enshrined<sup>262</sup> without always following though a consistent trend in its interpretation of rights.<sup>263</sup> Nonetheless, in its work so far, the HRC does not appear to have taken as radical a position as promoting the vision of an interdependent and interrelated rights-holder.<sup>264</sup> Where notions of dependence and relations are included their use is normally exceptional and is confined to specific contexts. The Human Rights Committee has thus made it clear, for instance, that institutional arrangements and material provisions such as social support, pension, disability allowance, health or social security are not covered by the Covenant — the State is not obliged to provide this kind of support to the rights-holder.<sup>265</sup> Where, however, such legislation exists it needs to not be discriminatory. Even then, however, the subject appears primarily divorced from the social context. Reference to interpersonal relationships and the wider social context is either missing altogether or, when made, it arguably reflects the normative underpinnings of individualistic accounts.

A characteristic example is the rather controversial decision in the case *Hendrika Vos v. the Netherlands*<sup>266</sup>, in which the HRC was called to decide whether a Dutch law aimed at providing pensions to widows when the breadwinner husband had died was discriminatory. In the specific case, its formalistic application had deprived a woman divorced for more than twenty years of her own pension in favour of the reduced pension she would receive as a widow. In the Committee's view no discriminatory treatment arose (Article 26 ICCPR), as the applicant's pension had been allocated on the basis of reasonable and objective criteria. While the case arguably reflects a more nuanced position by acknowledging that socio-economic entitlements

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*European Court of Human Rights*, pp 149- 189

<sup>262</sup> The HRC has recognised positive obligations through its General Comments, see in particular GC 31, par. 7

<sup>263</sup> see D.Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom law*, Oxford University Press, 1995, pp 19-20,

<sup>264</sup> S. Joseph, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, 2<sup>nd</sup> edition, OUP, 2004, pp 28-29, who notes the disproportionate number of communications which are of an essentially similar nature

<sup>265</sup> *Danning v. The Netherlands*, Communication No 180/1984, ICCPR, A/42/40, Decision of 9 April 1987; *Zwaan-de Vries v. The Netherlands*, Communication No 182/1984, ICCPR, A/42/40, Decision of 9 April 1987; *Hendrika Vos v. The Netherlands*, Communication No 218/1986, ICCPR, A/44/40, Decision of 29 March 1989; *Pauger v. Austria*, Communication No 415/1990, ICCPR, A/47/40, Decision of 26 March 1999

<sup>266</sup> *Hendrika S. Vos v. The Netherlands*, Communication No. 218/1986, Decision of 29 March 1989, CCPR/C/35/D/218/1986

fall within the scope of the right at stake, the Committee's analysis reflects an individualistic approach to selfhood. The applicant is anchored to her relationship with her deceased husband based on the formal criterion of widowhood; this, however, was neither conducive to her self-perception nor did it reflect her situation. Likewise, her working years and contribution to society as a single woman were not acknowledged. As O'Cinneide has aptly noted in commenting on this mainstream framework, "where positive provision is required, it is conceptualised as enabling autonomous individuals to be free to enjoy these specific rights [...] not what an individual is entitled to as part of their interdependent relationship with the state and society at large."<sup>267</sup>

On the other hand, there have been isolated cases where the HRC has adopted a less strict approach, primarily in the context of aboriginal applicants and their right to enjoy their culture (Article 27).<sup>268</sup> This less individualistic view of the human subject is probably attributable to the wording of the Article itself, as it is a right that can be enjoyed only "in community with the other members." In the landmark case of *Lovelace v. Canada*, for instance, when dealing with the loss of a woman's aboriginal status following her marriage to a non-Indian, the Committee underscored "The major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity."<sup>269</sup> On this basis the Committee found a violation of Article 27 ICCPR (right to enjoy the minority culture).<sup>270</sup> At a scholarly level, the Committee's reasoning in this case has been applauded but also attributed to the influence of feminist scholarship.

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<sup>267</sup> O' Cinneide, p. 170

<sup>268</sup> Scholarly discussions have focused on the right to self-determination and in particular how it has been applied by the HRC in the case of indigenous people which places much emphasis in the need for consulting processes. In explaining the difference between an individualistic and relational interpretation of this right, Young, for instance, has argued that whilst the former would place the emphasis on separation, non-intervention and independence of the group, the second would understand people as existing in relationship with one another. In the case of aboriginal communities the relational analysis secures channels of discussion and negotiation between the community and the state. see "Two Concepts of Self-Determination" in *Ethnicity, Nationalism and Minority Rights*, Cambridge University Press, (eds) S. May, T. Modood and J. Squires, 2004, pp. 176-196.

<sup>269</sup> See eg. *Lovelace v. Canada*, Communication No. 24/1977, Decision of 30 July 1981. The loss of aboriginal status and exclusion from the reserve raised issues under the gender discrimination clause (Articles 2, 3), freedom of residence (Article 12), private life (Article 17), family rights (Article 23 and 24), equality before the law (Article 26) and right to enjoy the minority culture (Article 27). According to Bayefsky, whilst there was a clear gender aspect to the case, the Committee might have preferred to omit it in view of admissibility considerations, see A. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace", *Canadian Yearbook of International Law*, Vol. 20, 1982, pp. 244-266.

<sup>270</sup> By not examining the rest of her rights, the HRC did not engage with what would have been an interesting juxtaposition in the context of her private and family life: following her divorce, Lovelace could raise her children, was entitled to social benefits like other citizens and was allowed to visit her parents and stay for limited periods of time in the reserve. Whether her rights were still violated would necessarily require a very contextual and relational analysis which would inevitably address Lovelace's perspective both as a woman and member of an aboriginal tribe.

While the gender perspective is not explicitly mentioned, it arguably lay at the heart of the case.<sup>271</sup>

Nonetheless, the specificity of the context in which a more relational subject is discernible does not challenge the mainstream presumption of the individualistic conception of autonomy underpinning most decisions. In other words, there is always a presumption in favour of the self-sufficiency of the individual and in favour of his/her atomism within mainstream human rights law.

## **8. The 'dormant' counterpart**

While the ICCPR and the ECHR incorporated some of the principles of the Universal Declaration, the missing principles were programmed to be given formal legal status with the adoption of the ICESCR, which entered into force in 1976, and the European Social Charter, which entered into force in 1966 and was revised in 1996. In many respects however, political circumstances were not favourable and the person these instruments envisioned remained in a rather 'dormant' state for many decades. This left the subject of mainstream human rights law that was meanwhile developing along the lines of individualistic perceptions of selfhood uncompleted and even un-challenged by what was meant to be its natural counterpart.

### **a. The Background**

Disputes among Western and Soviet States during the drafting process significantly hampered the preparation of these instruments and, consequently, the development and integration of their normative underpinnings within mainstream human rights thinking. Connected to this was the more modest and compromised text that was eventually adopted compared with what had been initially planned. Likewise, political reluctance to commit to socio-economic principles for many decades impeded the adoption of a complaints mechanism analogous to its higher-profile

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<sup>271</sup> For a discussion see H. Charlesworth and C. Chinkin, *The Boundaries of International Law : a feminist analysis*, Manchester University Press, 2000, pp. 223-224; D. S. Berry, "Contextualising International Women's Rights: Canadian Feminism, Race and Culture" in *Legal Feminisms: Theory and Practice*, (ed) C. McGlynn, 1998, pp. 125-127, K. Knop, *Diversity and Self-Determination*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2004, pp. 358- 372; A. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace", *Canadian Yearbook of International Law*, Vol. 20, 1982, pp. 244-266.

counterparts. At a doctrinal level, this meant, however, fewer opportunities for the supervisory bodies to flesh out and elaborate on the philosophical traits of the subject.<sup>272</sup> It also meant delays in the development of the substantive content of key provisions and bringing them into line with social changes.<sup>273</sup>

The adoption alone of the ICESCR took almost twenty years of negotiations and a further ten years before it entered into force. Even then the ICESCR remained in a dormant state for another ten years. The provisions of the ICESCR, a compromise between sharply disparate political views of Socialist and Western States,<sup>274</sup> had been drafted in a rather abstract manner and were in need of clarification. The absence of an authentic interpretation during the first decade of its life rendered the ICESCR a mere 'textual reference point' subject to speculative reading.<sup>275</sup> Meanwhile the civil-political image of the person already counted more than two decades of existence.

In 1986 the Committee on Economic, Social and Cultural Rights undertook the strenuous work of shedding light onto the text of the treaty. The absence, however, of a petition system — an idea which had been dismissed by the ICESCR drafters early on — for many decades restricted the possibility of the Committee to develop its insights beyond the more generalised process of reviewing State reports.<sup>276</sup> This void was only very recently overcome. In 2008, as part of a growing interest in the potential of the ICESCR, an Optional Protocol was adopted which establishes an individual and collective complaints mechanism. The Protocol entered into force in May 2013 and, at the time of writing, twenty Member States have ratified it, though no decision has been issued yet. For many scholars, the Protocol opens a door of opportunity to both concretise and mainstream into human rights discourse the philosophical assumptions underpinning the ICESCR.

Developments at the regional level were only relatively faster. In 1961 the European Social Charter was adopted, with the understanding that it would act as the 'natural counterpart' of

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<sup>272</sup> See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on its Development*, Oxford Monographs in International Law, Oxford University Press, 1998, p. 4

<sup>273</sup> See O'Cinneide, "Bringing Socio-economic Rights Back into the Mainstream of Human Rights: The Case-law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication", 27 July 2009, available at <http://dx.doi.org/10.2139/ssrn.1543127>

<sup>274</sup> For a thorough discussion of the ICESCR drafting process see, in particular, M. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on its Development*, Oxford Monographs in International Law, Oxford University Press, 1998

<sup>275</sup> Ibid p. 1; see also Economic and Social Council Resolution 1985/17, 22nd Plenary Meeting, 28 May 1985

<sup>276</sup> O'Cinneide, *supra* fn.

the ECHR in the field of socio-economic rights.<sup>277</sup> However, political reluctance to place under international scrutiny questions of social policy, combined with the wide disparities among Member States in their social and economic development, hampered the adoption of an early far-reaching draft. Instead the final text was relatively retrogressive, leaving out crucial socio-economic entitlements such as the right to housing<sup>278</sup>, to education, to cultural activities and freedom from poverty. The focus was primarily on “the rights of the worker” instead, which reflected the aspirations of the Western European States at the time.<sup>279</sup> At a doctrinal level, this meant that some of the missing principles of the UDHR, remained absent.

In the decades that would follow, the Charter enjoyed a rather “twilight existence” next to the thriving ECHR.<sup>280</sup> Monitoring was relatively lenient as Member States could choose upon ratification not to be bound by all provisions of the Charter. In addition, proposals for a complaint mechanism had been rejected early on. Communist States were in general reluctant to permit the intrusions into their sovereignty that an individual complaint would entail and Western States lacked enthusiasm for international guarantees on this kind of rights.<sup>281</sup> In the early 1990s however, a major effort was undertaken to re-vitalise the Charter.<sup>282</sup> A significant step forward was the revision of the text to include the missing UDHR entitlements and to bring the provisions of the Charter in line with social changes.<sup>283</sup> A second important change was the

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<sup>277</sup> See Special Message of the Committee of Ministers to the Consultative Assembly of the Council of Europe, 1954, Doc. 238; For a thorough analysis of the drafting process see A.H. Robertson, *Human Rights in Europe*, Manchester University Press, 1963, pp.140-150; D.Harris, ‘Lessons from the Reporting System of the European Social Charter’, in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, 2000; D. Harris and J. Darcy, *The European Social Charter*, (2<sup>nd</sup> ed.) , 2001, pp. 293–354; M. Shaw, *International Law*, Cambridge University Press, pp. 334-337;

<sup>278</sup> The initial Charter recognised the right to housing only with respect to family housing. For a thorough critique see D. Harris, “The European Social Charter”, *International and Comparative Law Quarterly*, Vol. 13, 1964, pp. 1076-1104

<sup>279</sup> *Ibid.* p. 1078

<sup>280</sup> D. Harris and J. Darcy, *The European Social Charter*, (2<sup>nd</sup> ed.), 2001, p. 12; see also O’Cinneide, “Bringing Socio-economic Rights Back into the Mainstream of Human Rights: The Case-law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication,” 27 July 2009, available at <http://dx.doi.org/10.2139/ssrn.1543127>

<sup>281</sup> *Ibid.* Harris, p. 18

<sup>282</sup> The characterisation of the Charter as a “sleeping beauty” is attributable to P. Leuprecht during the Opening Ceremony of the colloquy “The Social Charter of the 21<sup>st</sup> century “, available in *The Social Charter of the 21<sup>st</sup> century*, Council of Europe publ., 1997, p. 17; For a review of the rather invisible existence of the European Social Charter in the shadow of the ECHR and its rise in the 90s see in particular *Reforms of the European Social Charter- Seminar presentations delivered 8 and 9 February 2011 at the House of the Estates and the University of Helsinki*, (eds) N. Johanson and M. Mikkola, Ministry for Foreign Affairs of Finland publ., 2011, available at [http://www.coe.int/t/dGHI/monitoring/Socialcharter/Activities/50anniversary/ReformESCHelsinkiSeminarPub\\_en.pdf](http://www.coe.int/t/dGHI/monitoring/Socialcharter/Activities/50anniversary/ReformESCHelsinkiSeminarPub_en.pdf)

<sup>283</sup> For more on the Complaints Mechanism see R.R. Churchill and U. Khaliq, “The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?”, *European Journal of International Law*, Vol. 15 No. 3, 2004, pp. 417–456;

creation of a collective complaints mechanism, which entered into force in 1998. While the Committee can only receive collective complaints and its decisions do not enjoy the same enforcement procedure as the ECHR counterpart, its successful litigation on entitlements of pure socio-economic nature has set a positive precedent for other analogous socio-economic systems and has paved the way for the abridgement of these two sets of rights.

## **b. A counter- image under development**

At a scholarly level, the image of the human subject underpinning the ICESCR and the ESC has attracted less attention than the mainstream individualistic human rights subject. In fact, it has been argued that in view of the wide disparities among Member States both in terms of their economic and social development and in the way they apply their international obligations, there is no single unifying image emerging from these instruments. According to this view, Member States each have their own individual perception of the human subject, as reflected in their national social policies, which are simply too divergent to be fused within one image.<sup>284</sup> The position taken here is that there are, however, some common fundamental traits. However, the image is still under development in view of the ongoing significant changes on the field and, in particular, in anticipation of the ICESCR Committee's case-law.

Rights systems that deal with socio-economic entitlements and at a deeper level a positive-liberties approach to rights are, in general, associated with notions of human dependency, interdependency and collective responsibility.<sup>285</sup> "Socio-economic rights", O'Cinneide explains, "are concerned with securing the autonomy and dignity of the individual through the collective provision of basic goods. This involves what Berlin characterised as the "positive liberty" of individuals, i.e. the freedom that individuals enjoy as a result of the external provision and support they obtain from their membership in society, as distinct from the negative freedom from external interference to which individuals are entitled."<sup>286</sup> In their normative foundations

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<sup>284</sup> See R. Mohn, "Sozial Politik in Europa", Bertelsmanns Stiftung, 1992, p. 138, available also at [http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-75302B56-7699A28C/bst/xcms\\_bst\\_dms\\_32737\\_32738\\_2.pdf](http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-75302B56-7699A28C/bst/xcms_bst_dms_32737_32738_2.pdf);

<sup>285</sup> See W. Brugger, "Zum Verhältnis von Menschenbild und Menschenrechte" in *Vom Rechte, das mit uns geboren ist: Aktuelle Probleme des Naturrechts*, Konrad Adenauer Stiftung, Herder publ., 2007, p. 232

<sup>286</sup> O'Cinneide, "Bringing Socio-economic Rights Back into the Mainstream of Human Rights: The Case-law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication", p.14

lies “the idea of mutual interdependence of all individuals within society. At a scholarly level it is often argued that they are not necessarily premised on a rigid conception of the human being, but often develop their accounts by juxtaposition to the main traits of the individualistic abstract and autarkic person.<sup>287</sup> ” While they are not opposed to the idea of autonomy as such, they believe this can be best secured through collective provision.<sup>288</sup> Collectivity is thus understood as the counterpart of individuality; when put together, both notions draw the image of the human being into a complete picture.<sup>289</sup>

Both the ICESCR and the ESC follow a very pragmatic approach in describing their human subject. Next to the more abstract individualistic person of their civil-political counterparts, they depict the image of a real person with real needs.<sup>290</sup> Following the revision of the European Social Charter both instruments agree that the human person has not only basic biological needs, such as housing, clothing, food, and water,<sup>291</sup> but is also in search of a more flourishing life, such as the enjoyment of leisure and participation in cultural activities.<sup>292</sup>

In terms of securing his/her means of subsistence, employment holds a central position in both instruments as it allows this person to meet his/her needs as well as his/her family's. The human being is not forced to work but does not resort to 'parasitic living' either; what both instruments underscore is, rather, the human subject's need for opportunities to make a living and the need of each worker to preserve his/her dignity.<sup>293</sup> Both instruments further underscore that while this person may be able to meet his/her needs through work, at the same time they are susceptible to hazards that lie beyond his/her control, such as poverty, unemployment and sickness.<sup>294</sup> In the course of their development both instruments have increasingly emphasised<sup>295</sup> that this person is dependent on external support and that he/she relies on a series of institutional and social arrangements provided by the State in order to enjoy an adequate standard of life.<sup>296</sup>

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<sup>287</sup> J.M.Bergmann, *supra* fn., pp. 104-105

<sup>288</sup> O' Cinneide, *supra* fn., pp. 169-171

<sup>289</sup> K.H. Auer, *Das Menschenbild als rechtsethische dimension der Jurisprudenz*, p. 128

<sup>290</sup> *Ibid.* p. 160

<sup>291</sup> ICESCR, Article 11; (revised) ESC, Article 31;

<sup>292</sup> ICESCR, Article 15 and Article 7(d); the original ESC was of a more restrictive scope focusing primarily on employment and labour rights. Following its revision, provisions related to culture, sports and leisure were included. See in particular Article 22, 23, 30

<sup>293</sup> For a discussion see in particular M.Craven, *supra* fn. pp.194-225

<sup>294</sup> See “Sozialmodell und Menschenbild in der 'Hartz-IV' Gesetzgebung in *Gesetzgebung, Menschenbild und Sozialmodell im Familien- und Sozialrecht*, (eds) O.Behrends and E. Schumann, De Gruyter pub., 2008, pp. 57-63

<sup>295</sup> See in particular the revised European Social Charter and the General Comments issued by the ICESCR Committee

<sup>296</sup> See in particular ICESCR, Articles, 6,7, 9, 10, 12 and 13;



Central to the socio-economic frameworks is also the idea of collectivity, which has in recent years been further expanded to notions of inclusion and participation. If the civil-political subject is the ideal democrat who always preserves a space of individual freedom, the socio-economic counterpart emerges as an essentially social being. It is a person who lives with his/her family in a society<sup>297</sup> together with other humans and values his/her membership of the community. Guided by a sense of collective responsibility this person is not self-absorbed but relates to his/her fellow people, reacts to the plight of others<sup>298</sup> and resorts to group-based action such as strike action to remedy societal deficits.<sup>299</sup> In recent years both instruments have further emphasised the need of the human subject to be integrated in the life of the community and to be included in decision-making processes.<sup>300</sup>

Overall, the human subject that emerges from the socio-economic human rights instruments may be summarised as a fundamentally dependent and social being who relies on external support, feels drawn to his/her community, and cares about and relates to others. It is an image that has significantly evolved from the 'worker' envisioned in the early days of these two instruments but is still under further refinement in anticipation of the ICESCR Committee's jurisprudence.

If we now juxtapose the fundamental traits of this image as it currently stands with the two theories of the self analysed in Chapter I, it is safe to say that this conception of human nature comes at least *a contrario* closer to the relational model. A primary reason is that the idea of fundamental human dependence that this image assumes is hard to square with the individualistic presumption of the self-sufficiency and independence of the rights holder in the individualistic model. Both the revised ESC and the ICESCR make it clear that the human subject relies on social support and services provided by the State, such as social security, health care, education, employment opportunities and poverty reduction policies in order to realise his/her rights. Second, because of the essential sociability of the rights-holder, in contrast to the individualistic rights-holder. The socio-economic subject values his/her community ties and exercises his/her rights in interaction with other fellow humans. While his/her social ties are not as developed as relational theorists would expect, they nonetheless form an intrinsic aspect of

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<sup>297</sup> M. Prisching, "Solidarität: der vielsichtige Kitt gesellschaftlichen Zusammenlebens", in *Wohlfartstaatliche Grundbegriffe: historische und kulturelle Diskurse*, (ed.) S. Lessenich, Campus publ., 2003, p. 178

<sup>298</sup> ICESCR, Article 8; see also (revised) ESC Article 6, Article 14;

<sup>299</sup> M. Prisching, *supra* fn., p. 178

<sup>300</sup> *Ibid.*; See in particular the addition of participation in decision-making processes under the revised ESC compared to the original 1961 text, eg. Article 15, 23, 24; See also ICESCR, Article 13 and 15

the subject's essence and have a distinct positive connotation when compared to individualistic accounts.

To conclude this section (before going on to exploring the role of thematic treaties), the argument made here is the following: less on legal grounds and more due to unfavourable political circumstances mainstream human rights frameworks have been structured around an image of a human person who only partially matches the UDHR prototype. This person is a fundamentally free, independent and self-sufficient being who feels bound by the rules and principles of a properly governed society. Inclined to favour individualism but far from embodying the Kantian ideal of absolute self-determination, this image has been broad enough to apply to different rights-theories. At the same time, however, it is uncompromising in always presuming the existence of some degree of human autonomy of the rights-holder as developed in individualistic theories of the self. While this mainstream image was initially meant to be complemented by a fundamentally dependent and sociable counterpart, political reluctance hampered the process of integration and left this image in a prolonged dormant state. As a result, the mainstream conception of the individualistically autonomous person dominated the human rights discourse.

## **9. Adding exceptions to the norm: The vulnerable human subject**

Over the past 30 years the human rights world has witnessed a proliferation of instruments, the primary purpose of which appears to be to provide more information regarding the mainstream conception of the human person by adding exceptions of “vulnerable” categories. These instruments do not create new types of human persons nor do they denounce the mainstream conception of the individual. Instead they play a supplementary role in the sense that they carve out and embody variations on this mainstream conception of human nature; variations which had been marginalised and overlooked for primarily societal reasons. Schematically speaking, they could be imagined as smaller groups, which surround at an equal distance the mainstream conception. What is remarkable is that the list of this type of document that addresses the situation of vulnerable categories is not only extensive but proliferates at a steady pace. The study will focus on developments at the UN treaty level on the understanding that these reflect to a large degree the views of the international community.

At the UN level, this trend of reaching out to vulnerable or marginalised groups has been expressed through the adoption of thematic treaties. Thus in 1979, the UN Convention on the Elimination of Discrimination against Women was adopted, in 1981 the Convention on the Rights of the Child, in 1990 the Convention on the Protection of Migrant Workers and their Families, and in 2008 the Convention on Rights of Persons with Disabilities. Prior to that, in 1969, the Convention on the Elimination of Racial Discrimination had been adopted. In addition, during the drafting process of the CRPD the idea for a separate treaty that would codify the United Nations Principles for Older Persons was placed on the negotiation table.<sup>301</sup>

In principle nothing stands in the way of adopting more treaties. Suffice to mention that the Vienna World Declaration and Programme of Action also classifies persons who are very poor and indigenous people as particularly vulnerable categories. What is important to take from this list is the fact that the International Bill of Human Rights is surrounded by a gradually thickening web of separate treaties and soft law documents, all of which purport to provide guidance in the interpretation of rights for persons who are classified as particularly vulnerable. In addition, these thematic treaties have entered the human rights discourse in a very dynamic way. Contrary to the lower-profile ICESCR which only recently started moving into this direction, most of them are equipped with a functioning individual complaints mechanism.

All these peripheral instruments were born out of the realisation that certain categories of persons did not enjoy human rights as the majority and were marginalised from mainstream human rights protection. This core idea is reflected in the Preambles of those treaties. They all express their concern about the dire human rights situation of their target group, their belief that all humans are entitled to all human rights and underline their determination to rectify this injustice. The treaties therefore purport to provide additional safeguards and to secure the realisation of extant rights for people who encounter exceptional difficulties. Compared to the majority, these people are perceived to be in a disadvantageous social position which renders them particularly vulnerable and they are therefore in need of particular care.<sup>302</sup> Related to this

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<sup>301</sup> General Assembly Res 46/91, 1991

<sup>302</sup> See Preambles, UN CEDAW: "Concerned, however, that despite these various instruments extensive discrimination against women continues to exist... Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized... Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women, Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required.."; UN CRC: "Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.. Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.."; UN CMW:

is the denial of creating new human rights. The thematic treaties all set out by referring to the International Bill of Human Rights as the source of all rights and they are all grounded in the fundamental idea underpinning the UDHR, namely that all human beings are entitled to all rights. What they claim to be doing is merely complementing our human rights thinking by shedding light on or revealing hidden dimensions of extant rights. They achieve this by taking the standpoint of the target group and providing a new account of well-established rights which relates to the social reality of the group to be protected.<sup>303</sup> In their basis lies, therefore, a recognition of some lack of knowledge about human rights in the first place and human experience at a deeper level.

This shared rationale is also clearly stated in the 1993 Vienna World Declaration and Programme of Action. When referring to vulnerable categories who at the time did not enjoy a separate instrument tailored to their needs — for example persons with disabilities, as well as the extremely poor — the Vienna Declaration talks not only about their vulnerability but also about the need gain better knowledge about their viewpoint, their situation and the social exclusion they experience.<sup>304</sup> It is also for this reason that all thematic treaties and the 1993 Vienna Declaration emphasise the participation and inclusion of the protected persons in all decision-making processes, in particular about issues that affect them.

On the other hand, this proliferation of documents aimed at reaching out to vulnerable categories of people, comes with certain drawbacks. At a practical level, it has caused a series of logistics problems for both States and human rights bodies, who have to keep up with an

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“Considering the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment... Convinced that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection...”; UN CERD: “Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation, Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end”; UN CRPD: “Concerned about the difficult conditions faced by persons with disabilities..Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities”

<sup>303</sup> The CRC, for instance, bases its significant differences to other human rights treaties on its consideration of the principle of “the best interests of the child” (Article 3), which was arguably missing from our extant human rights thinking. On the same line of argumentation, the CRPD drafters clarify that “clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.”, <http://www.un.org/disabilities/default.asp?id=150>

<sup>304</sup> Vienna Declaration and World Programme of Action, par 25; see also D. Rodriguez Pinzon and C. Martin, “The International Human Rights Status of the Elderly Persons”, *American University International Law Review*, Vol. 18, Issue 4, (2003), pp 915- 1008

increasing and resource-demanding workload of reporting and monitoring. At a political level, there are legitimate concerns that further additions pose the risk of eventually diminishing the emblematic value of human rights.

From the perspective of legal analysis, this proliferation of vulnerable categories also appears to be creating a self-contradicting argument. Persons who are vulnerable or oppressed or at a social disadvantage are being characterised as so because they are compared to “others” who can apparently enjoy rights without special assistance. In other words, the idea of vulnerability does not appear as a free-standing notion but rather as a relative term. In the human rights context, however, the only available reference for comparison against which the notion of “vulnerability” can be juxtaposed is, necessarily, the mainstream conception of the “autonomous” individual that is connected to mainstream human rights law. This means one is vulnerable if one does not reach the threshold of this mainstream conception. Given, however, the continuously expanding use of the term “vulnerable” we end up with a structure where the mainstream “autonomous person” actually relates to only a small segment of the world's population and is surrounded by an unlimited number of “vulnerable” others. This structure seems hard to sustain unless we reverse the departure point and replace the mainstream metaphor of “autonomy” with vulnerability. The mainstream conception would then be one of the vulnerable human person who may exceptionally be self-sufficient and independent.

The position taken here does not depart much from this latter suggestion. In particular, the real contribution of all those thematic treaties and instruments does not necessarily have to do with the clarification of the term vulnerable, or with the particular type of person in the name of whom each one of them has been adopted. Whether it was a woman, a child or a disabled person is to an extent attributable to the degree of pressure exercised by the engaged advocacy groups and political circumstances. For instance, the CERD was adopted as a reaction to an epidemic upsurge of anti-semitic behaviours and other analogous racial incidents which occurred in several countries in the winter of 1959-1960.<sup>305</sup> Clearly human rights law never explicitly excluded any human being from its conception of the human person and therefore cannot be complemented by adding a woman or a child to its understanding.

The increasing trend to reach out to and include marginalised groups should be understood instead as an effort to address in a symptomatic manner a much deeper problem; namely an

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<sup>305</sup> E. Schwelb, “The International Convention on the Elimination of All Forms of Racial Discrimination”, *The International and Comparative Law Quarterly*, Vol. 15, No. 4 (Oct., 1966), pp. 996- 1068

unfinished account of human nature which has been built into human rights law and has shaped our interpretation. What is needed, therefore, is indeed to complement or even reverse our way of human rights thinking and take a vision of an interdependent or relational being as our departure point; a conception which the UDHR, as already demonstrated, supports.

This position finds support within the treaties themselves. Read from this perspective, namely of what these frameworks really add to our understanding of the human rights-holder, the notions of interrelatedness and interdependence easily emerge. To take as an example the CEDAW and how it contributes to the conception of the rights-holder, this is not so much the image of a woman but the image of a person who is relationally defined. The departure point of the CEDAW is that of a person who is embedded in a web of relationships; towards family members, State organs and society in general. The primary purpose of the CEDAW is to regulate these relationships. It purports to uproot societal prejudices and create a supportive social environment in both public and private spheres which will encourage the individual's personal development and participation in the life of the community. In other words, it explains human rights by taking into account their relational dimension. For example, it regulates the attitude of State organs towards a woman by ensuring that they will recognise her as a legal person and allow her full legal capacity to act. Within the private employment sector, it regulates that women should have remuneration and chances of getting promoted equal with men. It also addresses family life, stating that within the family men and women will share responsibilities in the upbringing of their children.<sup>306</sup>

Similarly, the basic idea underlying the CMW is the notion of adaptation to a new societal and cultural environment;<sup>307</sup> in other words, the significance of feeling part of the community. In a similar vein, the CRC takes a step further and adds to our human rights thinking the acknowledgement that some individuals are both interrelated and dependent to start with.<sup>308</sup>

The CRC constructs rights, therefore, on the predicate of the interrelated and interdependent nature of the individual. In its Preamble it already makes clear that every child, "for the full and

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<sup>306</sup> See Preamble and relevant Articles in the CEDAW Convention

<sup>307</sup> See Welfare of Migrant Workers and Their Families: Progress Report of the Secretary-General, 26 UN ESCOR Commission for Social Development, UN doc. E/CN.5/568 (1978), par. 12 : "regardless of these advantages, the migrant worker is confronted with a series of problems affecting his adaptation to a new environment, new housing and working conditions, and new cultural value patterns and behaviour.", as in J.A. R. Nafziger and B. C. Bartel "The Migrant Workers Convention: Its Place in Human Rights Law", *International Migration Review*, Vol. 25, No. 4, Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Winter 1991, p. 773

<sup>308</sup> See eg CRC Preamble: Bearing in mind that... the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"

harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” and that “childhood is entitled to special care and assistance”. Through a very pragmatic and holistic approach, the rest of the treaty in essence breaks down the duties of the State to create both a supportive material and societal environment which will offer guidance but at the same enable the individual to evolve according to his or her capacities. What is also noteworthy in the CRC is that it takes into account and regulates the assistance that the caretakers of such a person may need.

As will be demonstrated in a later chapter, the CRPD epitomises this process. Going a step further than its predecessors, it does not, like the CEDAW or CMW, restrict the idea of interrelatedness and interdependence to specific categories of people, nor does it view it as a temporary state, like the CRC. It simply constructs rights on the predicate that all human beings are naturally interrelated and interdependent. Seen as such, the CRPD is the last and most comprehensive chapter in translating the UDHR principles into contractual obligations. The recent adoption of an Optional Protocol for the ICESCR, almost forty years after its entry into force, appears to simply confirm the suspicion that human rights law has gradually moved towards a wider acknowledgement of interdependence as a composite element of human personhood.

At the scholarly level, this view finds support in those accounts which criticise mainstream human rights law for anthropological bias. Roughly summarised, the core argument when combining the different accounts is that the image of the independent and self-oriented being which underpins human rights law is too simplistic and reductionist a view of the person and incapable of encompassing the complexity of the human condition.<sup>309</sup> It identifies the individual by reference to his or her role in the economy, rather than by his or her role in political society.<sup>310</sup> Seen through this lens, human rights law is anthropologically biased because it has been tailored according to the social experience of the dominant segments of society and not from the standpoint of the oppressed ones. The social reality of the marginalised, however, is capable of revealing dimensions of human personhood and needs which the dominant segments ignore or deny and which outstrip any purely intellectual understanding of human rights law.<sup>311</sup> One such representative account has argued, for example, that many violations of women's

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<sup>309</sup> M. Cartabia, *The Age of “New Rights”*, *Strauss Working Paper 03/10*, *Strauss Institute Working Paper Series*, The Joseph and Gwendolyn Strauss Institute for the Advanced Study of Law and Justice, NYU School of Law

<sup>310</sup> C. Donnelly, “Positive Obligations and Privatisation”, *Northern Ireland Legal Quarterly*, 61:3, (2010)p. 212

<sup>311</sup> *Ibid.*; F. Robinson, “Human Rights and the Global Politics of Resistance: feminist perspectives”, *Review of International Studies*, (2003) 29, pp. 161-180

most basic human rights are left unrecognised, unpunished or un-remedied precisely because they are being interpreted through an anthropocentric lens which is too distant from their truth.<sup>312</sup>

While many of these accounts focus on better defending the rights of different oppressed groups, the core of their argument is in essence the same: that we need to expand or even reverse our mainstream understanding of personhood within the human rights framework so as to include the oppressed group they represent.

This requires a reversion of our 'dominant' lens: The distance between the rather narrow construction of the mainstream image and the truth of the oppressed “can begin to be traversed only if we claim the audacity to look at the human rights models from the standpoint of the historically oppressed groups”. After all it is them who can benefit more from human rights law, rather than the other way round. Seen through this lens, it is further argued, rights do not emerge as essentially separate claims but have the potential for interdependent entitlements grounded in social experience.<sup>313</sup>

It is further important to note that what all these accounts emphasise is not the lack of due diligence on behalf of States to implement an otherwise perfectly established scheme of rights and duties. Instead, the core of their criticism concerns the difficulty of human rights law to welcome in the first place, and cope with claims from, cases where the person does not fit the image of the assumed rights-holder. It is precisely for this reason that they ask for a more expanded or 'informed' conception of personhood. Whether human rights law is the right agent for this reform is a valid concern that is often raised, but is one which relates to the wider discussion that will not be addressed here; namely on the role of human rights as a modest definer of minimum-standards or as a major world reformer.

## 10. Why vulnerability is not the optimal solution

Before closing this discussion and proceeding with an examination of how the mainstream vision of the “presumably self-sufficient person unless exceptionally vulnerable” rights-holder has

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<sup>312</sup> V. Spike Peterson and L. Parisi, “Are women human? It's not an academic question”, *Human Rights Fifty Years on: a Reappraisal*, ed. T. Evans, Manchester University Press, 1998, pp 132-159

<sup>313</sup> see U. Baxi, "From Human Rights to the Right to be Human: Some Heresies" (1986) 13 *Ind. International Quarterly*, p. 199; C. Scott, “The Interdependence and Permeability of Human Rights Norms: Towards the partial Fusion of the International Covenants on Human Rights”, *Osgoode Hall Law Journal*, Vol. 27, No. 4, (1989), p. 787;



affected our construction of positive obligations, it is useful to take a small pause and address a point very briefly raised in Chapter I on selfhood, but which ties better together with the discussion here.

In particular, as noted already in Chapter I, there has been a recent growing interest among human rights scholars into the notion of vulnerability underpinning the thematic treaties. Inspired by feminist theories that identify the normative drawbacks of the individualistic self, several studies suggest expanding the idea of thematic vulnerability into universal vulnerability in human rights law. To put it simply, they argue that if we use the image of the vulnerable individual as our mainstream metaphor and ground human rights-law in the concept of universal vulnerability, we will extract a more enhanced framework of protection from international human rights law.

The position taken here differs from those views to the extent that it considers that the notion of the “relational” person is a more appropriate metaphor than that of the “vulnerable” person to complement our perception of the subject of international human rights law. While the notions of vulnerability and relational selfhood are to an extent interrelated, choosing the latter is not just a linguistic preference. It is of theoretical and analytical importance given the specificities of the human rights context. The reasons for this are described in detail immediately below.

To clarify further the position before engaging in the analysis, it should be mentioned that the focus here is very narrow; namely we are dealing only with the question of whether our starting point to describe the subject of human rights law should be the notion of universal vulnerability, as has recently been argued, or of interdependence, as is argued here and has been described in Chapter I. The position advanced here is that from the perspective of international human rights law the relational individual is an optimal metaphor to describe the rights-holder. This does not mean that vulnerability is conceptually wrong or unnecessary to describe specific situations of human rights violations. It is, however, questionable whether vulnerability is the right term to frame situations in which the real person does not match the mainstream image of the rights-holder and whether such a classification is the right path to follow altogether in the particular context of international human rights law.

In particular, human rights literature has recently witnessed a growing interest in the notion of vulnerability and how this concept could serve as a normative basis for expanding the scope of human rights protection. In the discourse of vulnerability and human rights of particular

influence has been the normative framework developed by the theorist M. Fineman. In her influential work on *The Myth of Autonomy*, Fineman develops a theory of justice in which she seeks to derive collective societal responsibility from basic needs and current inequalities through the notion of “universal vulnerability”.<sup>314</sup> Her main thesis is that the idea of individual autonomy within the meaning of independence is a myth which has seriously limited the ways in which we think about equality and entitlements. Society, she explains, has privatised the experience of human dependency and allocated the burden of care-taking to some members with the family. If we accept, however, that dependency in all its forms is “a universal and inevitable phase in the human condition” then the responsibilities for care-taking become a collective societal concern. The conceptual separation of the family from other societal institutions is lifted and the State becomes an active partner by default.<sup>315</sup>

There is common ground between Fineman's account and relational legal theories as developed in Chapter I in the sense that she also questions the image of the independent self-sufficient individual as the basis for any conceptual framework and looks into the wider societal responsibilities for fostering rights. However, Fineman opts for the term 'vulnerability' to best frame her theory. Vulnerability, she explains, offers fertile ground compared to the alternative concept of dependency. It has a connotation of continuity, which is desirable as opposed to dependence, which can be more ephemeral. In addition, linguistically vulnerability is a concept that is under-explored and, therefore, more ambiguous and less associated with specific connotations. This renders it more apt and capable of being molded.<sup>316</sup>

Her insightful account of vulnerability as a universal, inevitable and inherent condition of human nature has appealed to international human rights scholars who seek to argue for a more expansive State role on the basis of our common and shared vulnerabilities.

Within the realms of feminist theory, the differences between a vulnerable and a relational or interdependent being are subtle and these two terms are often used interchangeably. Accounts grounded in either notion share a common starting point and purpose: to dispel the image of the self-sufficient and independent individual as a basis for any rights-framework and rectify the inadequacies this has caused by instead advancing the conception of the human as a needful and interdependent person. As Mackenzie has rightly pointed out, vulnerability and relational

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<sup>314</sup> M. Fineman, p. 29

<sup>315</sup> M. Fineman, p. 307

<sup>316</sup> See also M. Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition”, *Yale Journal of Law and Feminism*, Vol. 20, No. 1, 2008, Emory Public Law Research Paper No. 8-40

autonomy are not oppositional terms: “there is no inherent tension between an adequately theorized conception of autonomy, which is premised on a conception of the self as relational and acknowledgment of universal vulnerability.”<sup>317</sup>

However, universalist claims that vulnerability is a constant feature of the human condition may obscure important distinctions between different sources and states of vulnerability. “Many kinds of vulnerability are primarily the result not of unavoidable biological processes, but of interpersonal and social relationships or economic, legal, and political structures.”<sup>318</sup> There is also concern that simply focusing on vulnerability and on the protection of the vulnerable individual without at the same time including the notion of fostering the autonomy of the person we seek to assist, opens the door to coercive forms of intervention or paternalistic relations, policies, and institutions.<sup>319</sup>

To now return to human rights discourse, simply replacing the individualistically autonomous human rights-holder with a vulnerable one but leaving out relations will not get us very far in addressing old pitfalls at either the theoretical or the analytical level; for example, where coercion is present, or the question of when the adequacy test has been met. In addition, as Mackenzie rightly points out, we miss the perspective of the individual himself/herself, a significant drawback of individualistic accounts. To put it simply, the solution does not lie in a vulnerable subject built along the lines of an acontextual approach; what we are still missing is the element of a relational understanding of autonomy, ideally one in which rights are realised through fostering and caring relations.

In addition to this, in the specific context of human rights law there are further reasons why it is preferable to talk *a priori* about an interdependent or relational person than a vulnerable one, and why the term relational offers a better analytical tool.

At the conceptual level, perhaps the defining difference between the two notions is their relation to the idea of risk. Vulnerability is by definition linked to the idea of “risk”.<sup>320</sup> It begins

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<sup>317</sup> C.Mackenzie, “The Importance of Relational Autonomy and Capabilities for an Ethics of Autonomy”, in *Vulnerability: New Essays in Ethics and Feminist Philosophy*, (eds) C. Mackenzie, W. Rogers, and S.Dodds, Oxford University Press, 2013, p. 41

<sup>318</sup> Ibid.pp. 39, 41

<sup>319</sup> Ibid. p. 41

<sup>320</sup> The United Nations Department of Economic and Social Affairs offers the following definition: “In essence, vulnerability can be seen as a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences. It exists at all levels and dimensions in society and forms an integral part of the human condition affecting both individuals and society as a whole”, as in P. Kirby, Theorising Globalisation's Social Impact: proposing the concept of vulnerability”, *Review of International Political Economy* 13:4 October 2006, pp 632-655, pp. 636- 637

with the idea of risk and leads to specific outcomes defined by the set of available risk management options; vulnerability may come *from* a specific risk or a person may be vulnerable to a specific outcome.<sup>321</sup> In law vulnerability is normally classified as either personal or social. The former describes situations where vulnerability arises from biological causes, such as age or ill health, and is seen as an individual situation; in the latter, vulnerability is attributable to external societal factors, such as institutional arrangements, societal prejudices or financial circumstances. The first one is often seen as inevitable, while the second one as preventable. Scholars agree however that these distinctions are not strict and that vulnerability may arise from the interaction of various sources.<sup>322</sup>

In view of the conceptual framework briefly sketched here, to render vulnerability as a “universal” human condition as several human rights scholars argue, would require either that we identify some sort of parameter to which we are all vulnerable or identify for each one of us isolated risks so as to be able to claim that we are all vulnerable in some way. The second is, relatively, easier to do. In the first case, we could, for instance argue that we are all vulnerable to sickness, disability or ill health so as to exact State protection for the basic needs of all, as Fineman argues. Translated into human rights as legal rights, this could presumably secure a right to health and to an adequate standard of living. The problem with both lines of argumentation is that they provide a narrowly constructed basis for structuring rights. They both have the effect that the way we decide or choose what rights matter will depend on how we define the risk; and to define risk we need to take into account context-specific parameters. For instance, it would be hard to find a universal definition of risk that would be able to accommodate both socio-economic rights and civil-political rights such as freedom of expression within one framework. Likewise, to create a list of risks each one of us is vulnerable to would result in an open-ended list and overly fragmented framework.

Assuming, however, that the first obstacle — that of defining risks of universal applicability — were overcome, we would still need benchmarks in order to assess when a violation had occurred. In human rights law this would entail agreeing on a socially accepted minimum, below

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<sup>321</sup> For a thorough conceptual analysis see, in particular, J. Alwang, P. B. Spiegel and S.L. Jorgensen, “Vulnerability: a view from different disciplines”, Social Protection Discussion Paper Series, No 0115, June 2001, who divide vulnerability theories into three categories depending on the component of risk they focus on, namely: a) the risk or risky events, b) the risk responses and c) the outcomes in terms of welfare loss (or underlying conditions of risk).

<sup>322</sup> M. I. Hall, “Equity Theory: responding to the Material Exploitation of the Vulnerable but Capable”, in I. Doron (ed) *Theories on Law and Ageing: the Jurisprudence of Elder Law*, Springer publ. 2009, pp. 108-110; M. Fineman, “Cracking the Foundational Myth”, *Journal of Gender, Social Policy and the Law*, Vol. 8:13, p. 18

which nobody should fall. To argue vaguely that we are all vulnerable without further qualifiers would otherwise not be of practical use.<sup>323</sup> We thus fall back, however, in the same pitfalls we tried to avoid in the first place, such as the lack of resources in the case of socio-economic rights, the adequacy criterion, the conflict between individual interest and State interest and so on.<sup>324</sup> Further to this, it has also been argued that even the notion of “exposure” to risk is a further parameter that necessitates definition if we are going to use vulnerability as a basis for legal analysis. For instance, would mere exposure to risk be adequate to trigger human rights protection? Or would possible probability be more appropriate in other cases?<sup>325</sup>

Next to these wider theoretical and analytical considerations, in the specific context of human rights practice vulnerability has so far been applied to describe categories of persons that should enjoy enhanced protection. Principally speaking, these should be persons who are at a high exposure to certain risks in combination with a reduced ability to protect themselves. Nevertheless, the concept has been applied in a fluid, open-ended and unprincipled manner.<sup>326</sup> For instance, a final catalogue of vulnerable groups has not been developed yet with most human rights documents often including an “and other” clause, to indicate that the list is not exhaustive.<sup>327</sup> Categories that have so far been characterised as vulnerable include migrants, asylum-seekers, detainees, women, children, indigenous people, elderly people, people affected by war and the poor.<sup>328</sup> A universally applicable list, however, has not yet been developed and most likely would be hard to agree upon given the current ambiguities and the lack of commonly accepted indicators.<sup>329</sup>

This fluid use of the concept has led to inconsistencies not only among the different instruments but also within the same frameworks of protection.<sup>330</sup> For example, while the 1993 Vienna Declaration lists the poor as a particularly vulnerable category, within the ECHR framework they are not considered as such.<sup>331</sup> Likewise, in the ECHR context, the term vulnerability has been applied in an overly-broad manner to describe prisoners, asylum seekers, children and mentally

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<sup>323</sup> J. Alwang, P. B. Spiegel and S.L. Jorgensen, “Vulnerability: a view from different disciplines”, *Social Protection Discussion Paper Series*, No 0115, June 2001, p. 28, 30

<sup>324</sup> Ibid.

<sup>325</sup> Ibid. p. 34-35

<sup>326</sup> See in particular: A. H. Morawa, “Vulnerability as a Concept of International Human Rights Law”, *Journal of International Relations and Development* 6(June 2003) , pp. 139-155

<sup>327</sup> Ibid. p. 141

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> See in particular the Partly Dissenting and Partly Concurring Opinion of Judge Sajo in the ECtHR case of *MSS v. Belgium and Greece*,

<sup>331</sup> See *van Volsem v. Belgium*, described in detail in the subsequent Chapter on positive obligations

disabled persons, but not physically disabled people. Similarly, the applicable criteria are also vague and inconsistent, varying from human nature to bureaucratic delays among public authorities.<sup>332</sup> Apart from this, frequent use is also made of the term of “particularly vulnerable” as opposed for instance to simply “vulnerable”. It is open to speculation whether this emphasis is used to solely signal vulnerability or indicate a hierarchy or higher degree thereof.<sup>333</sup>

In fact, recent human rights instruments have started replacing the term “vulnerable” with “marginalised” to describe the affected persons. The most characteristic example is the CRPD which does not mention the word vulnerability at all. To an extent this is also attributable to the pressure exercised by representative organisations who wish to dispel the connotation of weakness and paternalistic attitudes that “vulnerability” is often associated with.<sup>334</sup>

The reason why the image of the “relational” individual is an optimal metaphor is because like vulnerability it disposes of notions of self-sufficiency, independence and self-reliance, but does not put the emphasis on external risks. Instead it highlights the social dimension of selfhood and how rights can be realised through relationships to others. The interdependent individual is a person who stands in the middle of a web of relations, through which he/she can fulfil his/her rights by definition. Theoretically speaking, it is a more generic term compared to vulnerability and is therefore more suitable to describe *a priori* the rights-holder. Instead we should reserve the idea of vulnerability to signal precisely those very context-specific cases of an imminent threat or harm.

In any case, even if someone would reject all above-mentioned arguments and consider vulnerability to be the most appropriate term to both capture this notion of lack of self-sufficiency and at the same time offer the best option as an analytical tool, this would still not alter the outcome; namely no matter how we describe the rights-holder we will still need in the end to resort to the methodology and normative views of a relational dimension of selfhood in order to avoid the pitfalls of atomistic constructions. In other words, even the universally vulnerable person has to be surrounded by relations that can foster or enhance the realisation of his or her rights, in order to effectively offer an alternative framework to the individualistic self. The real challenge in both cases is not so much choosing the right word to phrase this rejection of individualism, but to identify which relations matter and how they should be structured; in other words, which relations are relevant to fostering or impeding the enjoyment

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<sup>332</sup> Ibid.

<sup>333</sup> Ibid., p. 142

<sup>334</sup> Ibid.

of the rights at stake and how we can transpose them into law.

## **11. Conclusion**

To sum up and return to the question raised at the beginning of the Chapter, namely on the conception of the human person underlying human rights law, the answer provided is the following: while in the philosophical roots of human rights law we may find a very broad perception of the human subject, mainstream human rights law has nonetheless been structured around the image of a person who is best described as a presumably (individualistic) autonomous subject. It is a person who is fundamentally free, autarkic and independent, who feels bound by the rules and principles of a properly governed society and who has evolved over the years to relate to different rights-theories. At the same time, however, it is uncompromising in always presuming the existence of some degree of self-sufficiency of the rights-holder, as developed in individualistic theories of the self. While this mainstream image was initially meant to be complemented by a fundamentally dependent and sociable counterpart, political reluctance hampered the process of this integration and left the missing dimension in a prolonged dormant state. As a result, the individualistically autonomous person dominated mainstream human rights discourse.

Over recent years a series of thematic treaties and peripheral instruments have juxtaposed to this mainstream human rights holder a group of particularly vulnerable individuals, such as women, children, migrant workers and their families, and persons with disabilities, who are in need of care and assistance in order to be able to realise their rights. The argument made here is that classifying such marginalised people as separate categories of persons that are distinguished from the mainstream conception through the rather vague criterion of vulnerability entails theoretical, analytical and practical drawbacks.

Instead, we should look at the wider picture and explore what lies beneath this proliferation of thematic metaphors. The position taken here is that underneath this trend to reach out and address the needs of marginalised or vulnerable groups lies a wider acknowledgement of interdependence and interrelatedness as constituent elements of human personhood; seen as such, the thematic treaties are the expression of a change that runs at a much deeper level, namely of a gradual transformation of our central metaphor. This evolution does not stand on

thin air but may be traced back to UDHR conception of the two-minded and interrelated human person. Seen as such, this trend reflects a clear course within human rights law to move away from individualistic conceptions and complement the mainstream image of the (individualistic) autonomous individual with the image of the interrelated and interdependent person.



### Chapter III. Positive Obligations under International Human Rights Law

Understanding the human person that is posited beneath human rights law is not only of theoretical value but has also practical implications. An overly reductionist view of the human person may give rise to a limited set of duties for the State. On the other hand, an expansive perception of personhood may require the State to assume a wider role that acknowledges and responds to the different facets of individual personality.<sup>335</sup> Knowing the image of human nature from which rights and duties flow thus helps us to not only explain the content and boundaries we attribute to rights but also to design and adjust our basic concepts according to the outcomes we wish to achieve.

The finding that there is an increasing trend within human rights law to shift away from notions of independence towards needfulness and interdependence directly affects the manner in which we interpret and shape State obligations. If the independent individual merely requires from the State the provision of some basic material and institutional arrangements and that it otherwise abstains, the relational subject allocates to the State a more engaging and protective role that goes much further. The State is no longer perceived as an aggressor and/or detached provider but as an engaging guarantor. It is expected to bend over and listen to “the vulnerable witness in need of police protection, the abused child in need of a safe home, the homeowner suffering pollution from the nearby factory, the transsexual concealing his or her birth certificate” and undertake duties of care and assistance.<sup>336</sup>

In legal terms, what the evolution from the independent to the interdependent person translates into is a transition from thinking primarily in terms of negative liberty to thinking in terms of positive liberty, from applying negative obligations to placing positive obligations in the forefront of human rights protection and, most crucially, from thinking in terms of material self-sufficiency only to including also the social environment within our analysis. This transition, however, entails a set of challenges that have to be addressed.

At a scholarly level, the concept of positive obligations remains relatively uncharted in the existing literature.<sup>337</sup> Most critical studies stem from scholars interested in socio-economic

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<sup>335</sup> C. Donnelly, “Positive Obligations and Privatisation”, *Northern Ireland Legal Quarterly*, Vol. 61, Issue 3, 2010, p. 212

<sup>336</sup> Ibid.

<sup>337</sup> A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publ., Oxford, 2004

rights, the protection of which has traditionally suffered more from the apparent ambiguities and judicial lenience in the application of positive obligations.

The present Chapter will seek to integrate into the debate on positive obligations the lens of the human self and review the notion of positive obligations within mainstream human rights law in light of its individualistic subject. In particular, we are going to attribute the unease with which positive obligations are currently being interpreted and applied within mainstream human rights law to the tension between two underlying images: between the image of the (individualistic) autonomous individual upon which mainstream human rights law has been structured and the image of the needful and sociable person that positive obligations naturally encounter. Mainstream human rights law defines positive obligations as calls for material assistance, under the assumption that once access to material welfare has been achieved, autonomy (within the meaning of independence), will be automatically ensured. Once translated into practice, however, this model is challenged by human diversity and the human need for sociability. On the one hand it fails those applicants for whom the *telos* of this abstract idealistic view of independence appears naturally unattainable. On the other, it is unable to articulate situations in which the applicant asks for access to a fostering interaction as part of realising their rights. The Chapter will argue that, to a large extent, current inconsistencies and arbitrary interpretations within human rights jurisprudence are directly attributable to the narrow basis for analysis and the limited tools the metaphor of the individualistic subject provides us with in order to legally interpret reality.

The structure of the Chapter will be as follows. After outlining the jurisprudential birth and development of positive obligations within human rights law, the Chapter will analyse the concept itself. It will thereby engage with three core issues that have preoccupied human rights scholars: first, the positive-negative dichotomy and the alleged differences between positive and negative duties; second, the substitution of the conceptual distinction between positive and negative obligations with alternative typologies; and third, the suggestion of merging all kinds of unacceptable State behaviour under one umbrella term. In reviewing each one of these issues, the aim is less to prove the normative truth of the answers we are providing — as these depend from our standpoint on the account of the self one adopts — but rather to illustrate how adopting the lens of the human subject sheds new light in addressing these long-standing concerns. The section will conclude that if we adopt a moderate relational or individualistic conception of the self, it is always normatively possible to distinguish between a call for

assistance and a call for abstention.

As a next step the Chapter will then proceed to analyse the meaning and scope of positive obligations as they are understood within mainstream human rights law. To this purpose, after outlining the main jurisprudential and scholarly trends, the Chapter will build on the account developed by German scholar Dröge. It will argue that within an individualistic framework of human rights positive obligations are defined as calls for material assistance by the State circumscribed by the State's financial possibilities. Using ECHR jurisprudence as a test-case, the Chapter will examine the outcomes of this model in practice and attribute its shortcomings to two underlying issues: the equation of autonomy with independence and the absence of fostering relationships as an integral component of positive obligations.

The Chapter will conclude that, to a large extent, current injustices cannot be overcome in judicial practice, as is often suggested at the scholarly level, unless we revise the very narrow analytical basis that the individualistic subject generates.

## 1. The birth and development of positive obligations in human rights law

The notion of obligations, let alone of positive obligations, was not always as common in the human rights language as it is today. In fact, in the early days of the human rights movement there was an overall reluctance to talk about obligations at all. The emphasis was placed on the rights and freedoms that every human being was entitled to rather than on what the State had to do. The 1948 Universal Declaration of Human Rights, for example, hardly contains any references to State duties. Instead it applies a rights-formulation throughout the document, even with respect to principles which at the national level were at the time phrased in terms of obligations of States or society.<sup>338</sup> Where obligations are mentioned they refer to from the perspective of what what the individual owes to mankind; rather the the State to the individual. While the need for a language of duty that also pertained to States was acknowledged early on,<sup>339</sup> this form of expression was eventually omitted in order to avoid further controversies among the drafting parties.<sup>340</sup>

The first human rights treaties translating the UDHR principles into contractual obligations that States had to fulfil were also relatively sparing in allocating duties when compared, for example, to subsequent conventions. This hesitancy is attributable not only to the drafters' concerns regarding preparing too far-reaching instruments, but also to the prevalent belief at the time that "rights and duties were correlative and that every right carried with it a corresponding duty"<sup>341</sup>. It was thereby understood that rights were either negative or positive and could be fulfilled in one pre-determined manner. Negative obligations were linked to civil-political rights, which were understood as negative rights giving rise only to duties of restraint. Positive obligations were associated with economic, social and cultural rights, which were viewed as positive rights encompassing only duties of action. However, the positive-negative dichotomy of rights went further than that. Since civil-political rights were seen as relatively easy to implement, requiring States to simply do nothing, they were considered to be immediately applicable, justiciable and cost-free. These characteristics were also extended to their correlating obligations. Along the same lines, socio-economic rights, the realisation of which appeared more demanding, were viewed as giving rise to obligations that were aspirational,

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<sup>338</sup> M.A.Glendon, *supra* fn. , pp. 188- 189

<sup>339</sup> *Ibid.* pp 74- 78

<sup>340</sup> *Ibid.* p 180

<sup>341</sup> *Ibid.* p. 12

resource-demanding and subject to progressive realisation.

Both at a scholarly and at a jurisprudential level, however, the soundness of this strict negative-positive classification of rights was subsequently challenged. At a scholarly level, the breakthrough in human rights thinking is widely attributed to Shue's seminal work *Basic Rights: Subsistence, Affluence and US Foreign Policy*,<sup>342</sup> which questioned the supposed negative or positive nature of rights and advanced the notion of obligations as a basis for human rights analysis. The classification of rights into positive and negative ones, he argued, as if they were giving rise to one pre-defined type of duty was simplistic and misguided.<sup>343</sup> Rights have various aspects and "the complete fulfilment each kind of right involves the performance of multiple kinds of duties." Consequently the attempted division of rights can only cause confusion. "It is duties, not rights, which can be divided".<sup>344</sup> As will be analysed in more detail below, his seminal work gave rise to a broader debate questioning the soundness and utility of the notion of positive obligations altogether.

Around the same time, two milestone judgments the European Court of Human Rights used the term "positive obligations" in human rights jurisprudence for the first time, through a dynamic interpretation of the rather modest text of the Convention. Both judgements, admittedly far ahead of their time, advanced the concept of positive obligations as an inherent part of all human rights and overcame the civil-political and socio-economic dichotomy. The first was *Marckx v. Belgium*<sup>345</sup> where the Court found a violation of Article 8 (family life) because the Belgian authorities had refused to recognise the patrimonial rights of a child born out of wedlock. In an often-cited passage the Court held that:

"...the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities...Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life."<sup>346</sup>

The same year, in *Airey v. Ireland*,<sup>347</sup> when dealing with legal aid rights of a woman who was divorcing her abusive husband, the Court also found a violation of Article 6 ECHR because:

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<sup>342</sup> H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, 1st ed., Princeton University Press, 1980, Chapter 2

<sup>343</sup> Ibid. pp 35- 36

<sup>344</sup> Ibid. pp 50-52

<sup>345</sup> ECtHR, *Marckx v. Belgium*, Appl. No 6833/74, Judgment of 13 June 1979

<sup>346</sup> Ibid., par. 31

<sup>347</sup> See ECtHR, *Airey v. Ireland*, Appl. No 6289/73, Judgment of 9 October 1979, par 27

“the fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive [...] the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”<sup>348</sup>

Just a few years later, in 1985, the Court delivered another milestone judgment in the case of *X. and Y. v. the Netherlands*, which concerned the rape of a mentally disabled minor inside a private clinic and her inability to initiate criminal proceedings. Examining the case under the right to private life (Article 8), the Court found a violation by holding that:<sup>349</sup>

“although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the *Airey* judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”<sup>350</sup>

The significance of that case lay in the acknowledgment by the Court that positive obligations also arose in the context of relations between individuals, in other words beyond the classical relation between State and individual. Thus the whole doctrine of the horizontal effect of human rights appears, in its entirety, to be a consequence of the idea of positive obligations.<sup>351</sup>

The favourable outcomes in these early judgments provided the basis for the subsequent development of positive obligations through a gradually more expanded and sophisticated content, an evolution which has, by large, been accredited to the ECtHR's dynamic interpretation methods.<sup>352</sup>

In line with the principle of the indivisibility of rights, contemporary legal analysis agrees that all rights encompass a spectrum of legal obligations which may consist of both acts and omissions and that the effective realisation of human rights requires the fulfilment of both positive and

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<sup>348</sup> Ibid., par 26

<sup>349</sup> ECtHR, *X and Y v. the Netherlands*, 8978/80, Judgment of 26 March 1985

<sup>350</sup> Ibid, par 23

<sup>351</sup> See in particular D. Xenos, *Positive Obligations of the State under the European Convention on Human Rights*, Routledge publ. 2012, pp. 22-27

<sup>352</sup> Ibid.; see also A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Martinus Nijhoff publ., 2004

negative duties. This shift from rights-based towards obligations-based models of analysing rights, in combination with a stable growth in the number of human rights instruments that focus on State action as opposed to abstention, gradually rendered the notion of positive obligations a key concept within human rights law. As the International Law Commission noted, “The cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on action taken by a State”.<sup>353</sup>

## 2. The lack of a general theory of positive obligations in human rights law

Despite its increasing significance, an authoritative definition of positive obligations has not yet been provided by international human rights law. In fact, some supervisory bodies, such as the ECtHR, have explicitly refused to provide a sound theory.<sup>354</sup> This has allowed the term to be used with flexibility but has also led to apparent inconsistencies in their application – even within the same system. Questions regarding when a positive obligation arises, or does not, have provided fertile ground for criticism on the grounds of arbitrariness when judgements appear unsatisfactory.<sup>355</sup>

At a scholarly level, possible explanations for the apparent reluctance to commit to a specific theory of positive obligations are less of a legal nature, but rather attributed to the intention of human rights courts to keep their options open and to judicial prudence.<sup>356</sup> As the notion of positive obligations is both judge-made and has also significantly expanded the scope of human rights there may be reluctance to create absolute rules to which States may not want to adhere.

<sup>357</sup> At the end of the day, Van Dijk argues, notwithstanding how much vigour international

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<sup>353</sup> R. Ago, “Second Report on State Responsibility”, *Yearbook of International Law Commission*, Vol. 2, 1970, 177, 188, U.N. Doc. A/CN.4/233/1970, as in D. Shelton, “Private Violence, Public Wrongs, and the Responsibility of States”, *Fordham International Law Journal*, Volume 13, Issue 1, 1989, Article 1, p. 17

<sup>354</sup> “The Court does not have to develop a general theory of the positive obligations which may flow from the Convention...” ECtHR, *Case of Plattform "Ärzte für das Leben" v. Austria*, Appl. no. 10126/82, Judgment of 21 June 1988, par 31; see also the very critical Dissenting Opinion of Judge Martens, ECtHR, *Boughanemi v. France*, Appl. no. 22070/93, Judgment of 24 April 1996 who raises concerns about arbitrariness and legal uncertainty

<sup>355</sup> See in particular ECtHR, *Stjerna v. Finland*, Appl. no. 18131/91, Judgment of 25 November 1994, Concurring Opinion of Judge Wildhaber; among the many contributions see L. Clements, “Disability, Dignity and the Cri de Coeur”, *European Human Rights Law Review*, Issue 6, 2011, pp. 675-685; see also E. Palmer, “Beyond Arbitrary Interference: the right to a home?”, *Northern Ireland Law Quarterly*, Vol. 61, No 3, 2010, pp. 225-243

<sup>356</sup> C. Warbrick, “The structure of Article 8”, *European Human Rights Law Review*, Vol. 1, 1998, p. 34

<sup>357</sup> P. van Dijk, “Positive Obligations implied in the European Convention on Human Rights: Are the States still Masters of the Convention?”, in M. C. Castermans-Holleman, F. Van Hoof, & J. Smith (Eds.), *The role of the nationstate in the 21st century human rights international organisations and foreign policy essays in honour of*

tribunals display, judges are aware that human rights enforcement depends on the day-today will of participating States.<sup>358</sup> It is, nonetheless, generally accepted that positive obligations refer to those types of duties which require the State to take necessary steps and engage in specific activities in order to give effect to human rights and enable individuals to enjoy their rights. They thus lie at the antipode of negative obligations, which require the State to abstain from any sort of action that could tamper with a person's rights and freedoms. According to the often-cited passage of judge Martens dissenting opinion “Negative obligations require member States to refrain from action, positive to take action”<sup>359</sup>

The existence of a positive obligation, when explicit, is normally indicated by the use of words such as “respect”, “secure”, “recognise” “undertake”, “shall” or “promote”, which imply some form of State engagement and action. The exact choice of the verbs used varies and has often been interpreted as indicating the degree of commitment demanded of the State and thus an indicator of the scope of the obligation. For example, the terms “promote” or “recognise” arguably indicate an obligation of lesser intensity than “secure” or “undertake” which seem to provide a more solid basis for the recognition of an entitlement. Even though this distinction is not absolute, the *travaux préparatoires* of the various treaties often indicate that there is some merit in this first textual interpretation. In most cases, however, positive obligations are treated as implicit within the treaty. At a normative level they tend to find their legal basis in the principle of effectiveness and the general duty to secure the rights contained within each human rights treaty, a reflection of the broader principle of *pacta sunt servanda*, albeit inconsistencies are not infrequent even within the same system.<sup>360</sup>

What the precise content of this duty to act consists of has not been exhaustively defined and appears to be open-ended. At the UN level, positive obligations have traditionally been broken

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*Peter Baehr*, 1998, pp 32-33

<sup>358</sup> Ibid.

<sup>359</sup> ECtHR, *Gul v. Switzerland*, Application No. 23218/94, Judgement of 19 February 1996, Dissenting Opinion of Judge Martens approved by Judge Russo, par 7

<sup>360</sup> In the case-law of the ECtHR, for example, C.Dröge, argues that the Court follows three types of justification for positive obligations: Article 1, principle of effectiveness, and “no watertight distinction” between positive-negative obligations but that it is, in essence, the principle of effectiveness that matters, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, Max Planck Institut für Ausländisches und Öffentliches Recht, Springer publ., 2003, pp 184 -188; K. Starmer, views as the theoretical basis of positive obligations Article 1, the principle that the rights should be effective, and the principle that remedies should be effective, *European Human Rights Law*, Chapter 5, Legal Action Group, 1999, as in Mowbray, *supra* fn. , p. 5; J-F. Akandji-Kombe, discerns, on the other hand, a recent trend to justify positive obligations in the 'rule of law', “Positive Obligations under the European Convention on Human Rights“, Human Rights Handbook, No 7, CoE publ. 2007, pp. 8-10



down into three broad categories: legislative, administrative and judicial.<sup>361</sup> Within each of these categories, two more sub-categories are discernible, which refer to the nature of the measure at stake: procedural and substantial. The first category comprises the duty to set up the necessary legislative framework, in both its substantial and procedural dimension, to protect the rights enshrined and arguably enjoys a relative priority under human rights law.<sup>362</sup> The second category, administrative obligations, normally comprises the duty to execute the law, to complement the law with protective measures and to carry out operational action.<sup>363</sup> In the third category, judicial obligations primarily comprise the duty to monitor the actions of the other State authorities.<sup>364</sup> It is also accepted that while positive obligations are primarily applicable to violations committed by State agents against the individual, they may also be triggered in the case of violations committed by private parties. For that, it is necessary for the conduct of the private individual to be indirectly attributable to the State in the sense that the authorities failed to act or tolerated it.<sup>365</sup>

Despite these general rules and categorisations that have been developed primarily by the supervisory human rights bodies empirically, a theoretical account on positive obligations has not been offered yet by international human rights law.

### 3. The doctrinal debate on the concept of positive obligations

In the absence of a unifying normative theory, the human rights discourse on positive obligations has by large been built around the positive-negative dichotomy — a legacy of the classical dichotomy between positive and negative rights. Within this framework, the definition and scope of positive obligations are often examined together, primarily by juxtaposition to

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<sup>361</sup> ECtHR, *Osman v. the United Kingdom*, Judgment of 28 October 1998, Appl.no.87/1997/871/1083, paras. 115-116; see also Nowak, pp.60-62;

<sup>362</sup> C.Dröge, *supra* fn. pp. 79-80; see J-F. Akandji-Kombe, *supra* fn.

<sup>363</sup> *Ibid.*

<sup>364</sup> *Ibid.*

<sup>365</sup> See ICCPR, General Comment 31 par. 8: “...obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. [...]However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. ; see also J. F. Akandji-Kombe, *supra* fn., pp 15-16

negative obligations. The main question pre-occupying human rights scholars could be summarily described as “why do positive obligations result in lesser protection compared to negative obligations”? And, as a second concern, to suggest the best ways to overcome this. In the early days, the discussion did not focus on positive obligations as such but rather on the difference in the nature of positive and negative rights, which, in turn, gave rise to separate obligations with distinct natures and scopes. However, as mentioned earlier, this strict division of obligations according to the rights they are anchored to is, at the theoretical level, no longer sustainable and has also been surpassed by developments on the ground. Nonetheless, the ongoing scholarly interest in conceiving of positive duties against negative ones is not without merit and keeps on resurfacing. Legal practice shows that supervisory mechanisms dealing with individual communications have been less vigorous in monitoring State compliance with positive duties compared to negative breaches.<sup>366</sup> There is also general agreement that States are more willing to abstain than to act.<sup>367</sup>

Contemporary scholarship on the concept of positive obligations has, in general, followed three strands. A first strand, does not question the conceptual positive-negative dichotomy as such, but focuses on explaining, and eventually overcoming, the apparent differences in the protection afforded by positive and negative obligations. In essence it is a question of the scope of the obligations that fuses, however, elements of a conceptual nature. For this reason it is examined in this section. Scholars rely, in general, on three areas of contrast to explain the apparent differences between the two obligations at a normative level: their indeterminacy, their cost and their imminence.<sup>368</sup> To an extent, this debate is traceable to the old dichotomy between positive and negative rights and civil-political and socio-economic rights and, for reasons of coherence, it is examined first.

A second strand of discussion that has increasingly received scholarly interest questions the soundness and utility of the concept of positive obligation and the negative-positive dichotomy altogether, and suggests structuring obligations along alternative, more nuanced typologies. The main idea, then, is that if we overcome this rather unhelpful dichotomy and clear the concept of its negative legacy we would achieve a more comprehensive framework and eventually secure higher thresholds of human rights protection.

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<sup>366</sup> M. Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Chapter IV

<sup>367</sup> Vienna World Declaration and Programme of Action, 1993; see also S. Fredmann, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2008, pp. 69-89

<sup>368</sup> Ibid., S. Fredmann, pp. 69-88; M. Sepulveda, *supra* fn., pp. 122- 133;

A third strand seeks to dispose of typologies altogether, including any notion of positive and negative obligations. What is suggested instead is to use one umbrella term to describe all kinds of unwanted State behaviour securing thus a comprehensive and more solid framework.

The thesis will review all three areas of discussion, arguing that in all three cases the analytical lens ought to be reversed: instead of analysing the concept of positive obligations on the basis of empirically manifested differences and problematic areas, we ought to first understand what prompts us to construct and apply State obligations in those specific ways in the first place; and for this we need to first understand the kind of human we have in mind when prescribing the obligations the State owes to him/her. Only then can the path to enhancing protection be truly open. In terms of substance, the thesis will argue that if we adopt the lens of the human self and, in particular, of the moderate version of individualistic or relational autonomy, it is always possible to distinguish between situations where the State is asked to provide assistance and situations in which the State is asked to abstain. There is, thus, normative merit in maintaining the concept of positive obligations. The true challenge lies in deciding on the basis of what kind of a subject we ultimately want to design the concept.

#### **a. The distinction between positive and negative obligations: three areas of contrast**

Scholars theorising positive obligations by juxtaposition to negative obligations tend to primarily focus on three areas of contrast. The discussion concentrates, then, not on the concept of positive obligations as such, or their nature as international obligations, but rather the degree to which positive and negative obligations are or are not, by definition, different. Concept and scope are thereby closely intertwined and, in essence, dealt with together. Many of the arguments brought forward are empirically-based, drawing from the case-law of the different human rights systems to compare the two duties. Very often, what it comes down to is proving that securing better protection for positive obligations is normatively feasible, in particular in the field of socio-economic rights — a legacy of the positive-negative rights dichotomy. This study will not engage in detail with this debate, as it has been extensively covered in human rights literature and also touches upon different theoretical issues. In addition, part of this debate has been surpassed by recent developments on the ground, in particular in the field of socio-economic rights, as analysed in Chapter II. For reasons of comprehension the main views in

these three areas will briefly be reviewed.

The first area of contrast between positive and negative obligations concerns their indeterminacy.<sup>369</sup> While negative obligations are arguably precise and, therefore, capable of robust judicial resolution, positive obligations are indeterminate, open-ended, frequently vague and provide, therefore, a less concise basis for adjudication. If negative obligations prohibit all behaviours that may violate a right, positive obligations necessitate only one behaviour within a wider range of behaviours that would be capable of realising a right. This, in its turn, allows for more space for a claim to be dismissed compared to negative obligations. The classic example of this is the right to life: if the prohibition of unlawful killing demands the abstention from all deadly actions, the duty to save a life does not require the performance of all possible acts of rescue.<sup>370</sup> This vagueness becomes particularly evident in the context of positive obligations and socio-economic entitlements. Since there is “no universal and non-arbitrary standard for distinguishing need from luxury”, it is not for judges but for the political process to resolve disputes and draw the line on the basis of indeterminate standards.<sup>371</sup> Counterarguments to this view emphasise that negative duties also lack determinacy in the process of weighing and prioritising competing principles. If we follow this line of argumentation, therefore, then the conclusion will be that no decision can be ever reached on anything.<sup>372</sup> In addition, it is through judicial practice and repeated application that the shape and contours of an obligation gets sculpted. Positive obligations simply suffer a disadvantage compared to negative obligations. They have for a long time been marginalised from human rights jurisprudence due to their false association with socio-economic rights.<sup>373</sup>

The second area of contrast focuses on the issue of cost. Positive duties tend to be resource-demanding, while negative ones are presumed to be cost-free. This distinction is then often used to highlight the lack of democratic legitimisation of judges to take decisions about resource-allocations at a normative level and to explain their judicial prudence at a practical level. Against this view it has been counter-argued that the idea of a costless right is a myth as all duties entail costs to varying degrees<sup>374</sup> even if many of the budgetary implications of rights and duties are

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<sup>369</sup> M. Sepulveda, *supra* fn. , pp 131-133;

<sup>370</sup> E. Kastanas, *Unite et Diversite* as in Dröge, *supra* fn. , p. 356

<sup>371</sup> D Kelley *A Life of One's Own: Individual Rights and the Welfare State*, Cato Institute, 1998, p.1 as in S.Fredmann, p. 71

<sup>372</sup> S.Fredman, *supra* fn. p. 72

<sup>373</sup> M. Sepulveda, *supra* fn. , p. 132

<sup>374</sup> *Ibid.*, pp 127-128

hidden or indirect.<sup>375</sup> Further to that, it has been argued that the cost of rights and duties is a descriptive and not a moral theme.<sup>376</sup> Budgetary concerns become relevant when moral claims are transcribed into legal and enforceable rights. Since rights are, however, normally enforced in functioning and adequately funded courts, all rights and all duties entail significant expenditures.<sup>377</sup> Consequently, the distinction between positive and negative obligations on this basis alone is not sustainable.

A third area of contrast refers to their imminence or time-frame: negative duties are immediately realisable, while positive obligations tend to have a more long-term scope for realisation. The argument is then often linked to the issue of cost described earlier. This assumption has been challenged on grounds that both types of duties encompass a spectrum of State behaviours that may either be immediately feasible or aspirational.<sup>378</sup> Further to that, it has been argued that one should distinguish between the aspirational character of the right and that of the duty. The fact that the realisation of a right is time-consuming does not mean that it cannot correlate to negative or positive duties of immediate application.<sup>379</sup> In addition, it is wrongly assumed that the progressive or immediate nature of the duties is determined by the intensity of resources required. Compliance with international negative obligations may also require a prior extensive resource investment by the State.<sup>380</sup>

From the standpoint of this thesis, comparing positive-negative duties on the basis of differences as they have emerged from their application to concrete cases, is methodologically useful in outlining and describing human rights practices. It also gives us a picture of where our current understanding of positive obligations reaches its limits when solving legal disputes and where it is weaker compared to negative obligations. By way of illustration, a lack of resources is relevant in interpreting the content and contours of positive obligations but far less weight, if any at all, appears to be attached with respect to negative obligations; it thus seems capable of posing an insurmountable obstacle to the full implementation of positive obligations but does not have the same effect in the case of negative ones. In this sense, this kind of comparative analysis can

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<sup>375</sup> S. Holmes and C.R. Sunstein, "The Cost of Rights, Why Liberty depends on Taxes", Norton publ. 2000, pp. 22-23, 42-45; Holmes and Sunstein see positive elements in all rights and that all rights are, in essence, claims to affirmative Government response. An indifferent State can, in their view, never make the fulfilment of rights possible.

<sup>376</sup> S. Holmes and C.R. Sunstein, *ibid.*, pp. 18-19 who however attribute this judicial negligence to view hidden costs to the difficulty of accommodating the cost of rights with certain rights-theories

<sup>377</sup> *Ibid.*

<sup>378</sup> See in particular M. Sepúlveda, *supra* fn. , pp. 124- 126; S. Fredmann, *supra* fn., pp. 69-88

<sup>379</sup> *Ibid.*, S. Fredmann, pp. 81-84

<sup>380</sup> M. Sepúlveda, pp. 130-131

effectively map out problematic areas and pinpoint apparent weaknesses and limitations of our current construction of positive obligations.

If the purpose is, however, to enhance protection by overcoming the differences and boundaries that presumably stand in its way, as most accounts appear to aim at, then it is more helpful to first look into the underlying philosophical assumptions that are responsible for these differences in first place, rather than the other way round. For this we need to dig deeper into the vision of the human subject that guides our legal analysis. Seeking to amend or bridge differences that have resulted from the application of a concept without first looking at what has caused them, means we lose part of the picture; in essence, we end up trying to remedy the symptoms, the list of which is presumably open-ended, without addressing their cause. Since we will come back to this discussion in more detail when examining the analytical shortcomings of the individualistic approach, we will provide a preliminary answer to these three concerns, but will reserve our full analysis for later on.

In particular, if we review the debate from the standpoint of the human self, and if we take into consideration what kind of State action would correlate with an individualistic subject compared to a relational subject, then we can have some first indications of what causes these differences and the lower protection threshold for positive obligations. Within an individualistic framework of rights, autonomy is equated with independence and self-sufficiency. The State is thus expected to set up a framework of material and institutional arrangements which will enable the subject to attain a certain degree of self-sufficiency and independent existence, and to abstain the rest of the time. Because the State's provision consists of material services, the availability of State resources effectively circumscribes the scope of State assistance. Ideally, within this framework, everybody ought to be able to realise autonomy and enjoy all human rights; and the State acts or abstains within the boundaries of this framework. In this sense, all rights entail costs, positive and negative duties, and so on.

The problems, however, start when the State's plan and the assumption of human sameness are challenged by the truth of the human condition and by human diversity; namely, when this idealistic vision of independence that everybody is presumably able to reach is not attainable, or at least not as immediately. This is the point where the obligation to act starts to appear indeterminate, open-ended and costly when compared to abstention. Then our conceptualisation of what a State is expected to do reaches its limits and the boundaries that are otherwise implicit in our construction of rights and obligations come to the fore. The fact that

we don't always notice those limits does not mean that they are not there. To overcome these, however, at a more structural level it does not suffice to stretch or shrink our understanding of independence, because eventually we will keep on running up against the same boundaries. Instead, we ought to first revise the notion of autonomy we want to promote. A relational subject, for instance, implies a broader understanding of what autonomy means. It provides us with analytical tools to define the meaning and contours of positive obligations other than in terms of resources, material adequacy and independent existence.

## **b. Replacing the positive-negative dichotomy: Alternative classifications**

The call to replace the negative-positive dichotomy of duties with an alternative typology so as to overcome the pitfalls of our current framework has, at the scholarly level, been accredited to Shue. His seminal work described above not only contributed towards a more nuanced understanding of the normative character of human rights<sup>381</sup> but also advanced discussions on the notion of obligation and its analytical utility within human rights law. Shue himself suggested replacing the negative-positive dichotomy with a tripartite classification into duties of forbearance, aid and protection. This scheme had, in his view, the potential to overcome the deficiencies of the traditional negative-positive dichotomy of rights and duties.

His account shifted scholarly attention towards exploring the potential of obligation-based models and led to a proliferation of alternative classifications and typologies, which conceptualise State duties in different ways. A common characteristic among these alternative models is that they break down duties into more than two types, leading to trichotomies, tetrachotomies or even pentatomies of duties.<sup>382</sup> Scholars that support these typologies see in them a more nuanced understanding of the normative character of human rights as well as an analytical framework that is more comprehensive. The overall aim is through this blending to further bridge the gap contained in the positive-negative dichotomy and eventually to enhance human rights protection in areas which appear to have been neglected.

The most influential typology is the trichotomy respect-protect-fulfil introduced in 1987 by A. Eide while he was acting as a Special Rapporteur to the UN Sub-Commission. Roughly

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<sup>381</sup> I. E. Koch, "Dichotomy, trichotomy or waves of duties?", 5 *Human Rights Law Review*, (2008), pp 81-82

<sup>382</sup> I.E.Koch, *Human Rights as Indivisible Rights: The Protection of socio-economic Demands under the European Convention on Human Rights*, Martinus Nijhoff publ, 2009, Chapter 2

summarised, the first duty entails the obligation of the State to respect the individual's resources and freedom, the second the duty to protect individuals against acts of aggression by other subjects, and the third the duty to create opportunities and intervene in cases where a person cannot enjoy certain rights by his or her own means.<sup>383</sup> Eide's tripartite typology holds a central place within the human rights discourse and the doctrinal analysis of socio-economic rights in particular. It has been amongst others adopted by the UN Committee on Economic, Social and Cultural Rights, which has broken down the third duty, namely the duty to fulfil, into three further subcategories; to facilitate, to provide and to promote. It has been further taken up by the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>384</sup> Other influential schemes that have at times been proposed include Van Hoof's four-part scheme of respect-protect-ensure-promote and Steiner and Alston's five-fold typology of respect-protect-create institutional machinery-provide goods and services-promote.<sup>385</sup> The talk is then not about positive obligations as such but about the different measures, both negative and positive, that belong to each duty-category. Even though these kinds of structures have attracted increasing support, the older human rights bodies such as the ECtHR or the HRC continue to use the negative-positive dichotomy in order to analyse rights.

Scholars who are more sceptical about these alternative typologies, in particular the tripartite scheme used by the ICESCR Committee, have expressed concerns both about their utility as an analytical tool as well as their theoretical soundness. They have questioned, for example, the capacity of these alternative schemes, and in particular the trichotomy respect-protect-fulfil, to provide a more nuanced description of the overall notion of human rights obligation. The rationale underlying these schemes is that each right encompasses a spectrum of obligations which moves from more negative towards more positive ones.<sup>386</sup> The idea, however, "that the

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<sup>383</sup> A. Eide, UN Special Rapporteur for the Right to Food, "The Right to Adequate Food as a Human Right", Report prepared by Asbjørn Eide", , 1987, UN Doc E/CN.4/Sub.2/1987/23; On the application of the tripartite scheme by the South-African constitutional court see K. McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South African*, Pretoria University Law Press, 2009; O. de Schutter, A. Eide, A. Khalfan, M. Orellada, M. Salomon and I. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of State in the area of Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol. 34, 2012, pp. 1084-1169

<sup>384</sup> G.J.H. van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views", in *The Right to Food*, P. Alston and K. Tomaševski eds., 1984; Steiner H., Alston P. and Goodman R., *International Human Rights in Context*, 3<sup>rd</sup> ed., Oxford University Press, 2008, pp. 185-189 For a comprehensive analysis see in particular M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia publ., School of Human Rights Research Series vol. 18, 2003, pp 157- 248; see also I.E. Koch, *supra* fn. , pp. 81- 103; see also O. de Schutter, *International Human Rights Law: Cases, Material Commentary*, 2<sup>nd</sup> ed., Cambridge University Press, 2014, pp. 279-294

<sup>385</sup> For a schematic overview see M. Sepúlveda, *ibid.*, p. 248

<sup>386</sup> While in its original conception the duty to respect was a rather negative duty and the duty to fulfil a more



obligation becomes ever more 'positive' and resource-demanding as we move from the obligation to respect, through the obligation to protect, to the obligation to fulfil seems to work much better in theory than in practice.”<sup>387</sup> The duty to respect, for example, may entail the undertaking of highly positive measures and considerable budgetary consequences, such as the creation of the necessary institutional layout.<sup>388</sup> Likewise, it is flawed to assume that the duty to protect is somewhat more positive than the duty to respect and somewhat more negative than the duty to fulfil. In practice it can be equally as negative as the duty to prevent public actors from interfering with a person's rights, as well as the duty to ensure that public actors will comply with their human rights obligations<sup>389</sup>.

Finally, as Koch argues, if one removes the duty to protect, which has been squeezed in between the duty to respect and the duty to fulfil, it appears “that what we have achieved is only the substitution of the traditional 'positive/negative dichotomy with another dichotomous relationship between obligations of respect and obligations of fulfilment....it would not be fair to claim that we have obtained a particularly nuanced description of the overall human rights obligation.”<sup>390</sup>

Beyond that, it has been argued that the boundaries between the different concepts of duties are not clear and some measures seem to belong in more than one category, thus leading to inconsistencies in their application. As an example, critics refer to the inconsistent application of the trichotomy of duties by the ICESCR Committee during the examination of State reports and in its General Comment. A further point of criticism is that such typologies often envision a spectrum of undertakings that a State has to assume step by step in order to achieve the realisation of a right. In practice, however, it is often not possible to distinguish between the three levels of this trichotomy, since human rights claims often require a certain State behaviour which belongs to all three levels or the obligation is unidentifiable. In this case, it does not make much sense to conceive of human rights obligations as moving progressively along a continuum.<sup>391</sup>

From the standpoint of this thesis, to overcome the apparent boundaries in our understanding of State action it does not suffice to reshuffle the main pieces of the puzzle that constitute a

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positive one, the CESCR Committee has, to some extent, deviated from this by reading more positive elements into the obligations to respect and to protect. For more see Koch, *supra* fn., p. 20

<sup>387</sup> Ibid., Koch, p 92

<sup>388</sup> Ibid. Koch, pp. 17-18

<sup>389</sup> Ibid., Koch, p. 19

<sup>390</sup> Ibid, p. 20

<sup>391</sup> Ibid.; see also M. Sepulveda, *supra* fn. , Chapter IV and V

positive obligation. Instead, a profound re-construction of our current, admittedly restricting, framework is required.

In particular, at first reading, the core idea behind this approach appears to be that if we group together into different waves of duties the different measures entailed in the realisation of a right, we arguably underscore the indivisibility of human rights and duties and eventually overcome any past dichotomies. If we review the different accounts from the standpoint of the human subject, then one could deduce therefrom, at the philosophical level, an understanding about the complexity of human nature and well-being. Contrary to the more simplistic dichotomy of either action or abstention, these alternative schemes necessitate, for instance, a more sophisticated strategy on the part of the State to secure the human rights of the person, a reflection of his/her richness.

A main reason, however, why this model seems for its critics to bring about little change once applied in practice, and to obfuscate rather than clarify the obligation, is that they only view in it a re-grouping of duties the content and boundaries of which have already been empirically manifested within each system; in other words, if we simply transfer such a scheme into an individualistic framework, without altering the underlying image, we will see in practice little change. This might also explain the criticism that in the end we always have to deal with an action or an omission and that simply merging these together does not necessarily help clarify our current construction.

The problem with our extant mainstream framework in effectively accommodating claims where positive action is required is not how we label it. The problem does not lie with the obligation as such, as if it had a life of its own, but with the underlying philosophical assumptions that define its content and boundaries and, in particular, with the difficulty of accommodating claims where the real person does not match the metaphor in light of which we interpret the obligation. Simply transposing into an individualistic framework a different pattern to re-organise these duties is by itself not sufficient because we are still moving within the boundaries of the same framework; to challenge these we ought rather to challenge the image of the subject instead

### **c. Eradicating all typologies: the merging approach**

Another line of theorising which has gained increasing support among human rights scholars is

that of eradicating all typologies in favour of one umbrella-term. We have thus labelled it as the merging approach. In essence it suggests precisely the opposite solution to the previous one. The main idea is that instead of replacing the dichotomy with alternative schemes of duties, we should get rid of all typologies and use one umbrella concept, capable of covering all potential breaches of human rights. In this manner (that is, by blurring the boundary between positive and negative obligations) both the indivisibility of human rights is made clear and human rights enforcement is likely to improve. The examination of the violation will no longer be affected by the type of duty we are dealing with, and any negative legacies and judgments will no longer consume themselves in unnecessary boundaries and definitions.

The most often-cited passage reflecting this approach is found in the concurring opinion of Judge Wildhaber in *Stjerna v. Finland*<sup>392</sup> decided by the ECtHR in 1994. In that case, the Court had been asked to assess against Article 8 ECHR on private and family life the refusal by the Finnish authorities to allow the applicant to change his surname. In its reasoning, the Court found it unnecessary to determine the nature of the obligation that was at stake. It held that the dividing line between positive and negative obligations is, by definition, not watertight and the applicable principles were in any case similar. What really mattered, the Court argued, was the balance of the individual interest against the interests of the community. Eventually no violation was found. In concurring with the Court's approach Judge Wildhaber added in a separate opinion that:

“the dividing line between negative and positive obligations is not so clear-cut...In my view, it would therefore be preferable to construe the notion of "interference" so as to cover facts capable of breaching an obligation incumbent on the State... whether negative or positive. Whenever a so-called positive obligation arises the Court should examine, as in the event of a so-called negative obligation, whether there has been an interference with the right to respect for private and family life under paragraph 1 of Article 8 (art. 8-1) and whether such interference was "in accordance with the law", pursued legitimate aims and was "necessary in a democratic society" within the meaning of paragraph 2 (art. 8-2).”<sup>393</sup>

Judge Wildhaber himself conceded that in most cases the outcome would not necessarily change, but at least there would be more consistency within legal reasoning:

To be sure, this approach would not lead to a different result in the instant case, nor in all

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<sup>392</sup> ECtHR, *Stjerna v. Finland*, Appl. no. 18131/91, Judgment of 25 November 1994

<sup>393</sup> *Ibid.*, Concurring Opinion of Judge Wildhaber

likelihood in the vast majority of cases of this kind. It does, however, have the advantage of making it clear that in substance there is no negative/positive dichotomy as regards the State's obligations to ensure respect for applicable private and family life, but rather a striking similarity between the applicable principles."<sup>394</sup>

Many authors have read in this passage a suggestion of fusing positive and negative obligations under one umbrella concept, namely that of "interference", which would result in merging the boundary between the two sets of duties. The test, then, to assess whether a certain State behaviour would amount to a violation would be common, namely the proportionality test, which is to date applicable only to negative obligations. Given that the proportionality test is far more vigorous than the balancing tests of positive obligations, human rights protection would eventually also be enhanced.<sup>395</sup>

German scholar Dröge, however, rightly identifies that there are two different issues which are discernible in Wildhaber's opinion.<sup>396</sup> The first concerns the suggestion of merging the two sets of obligations within one concept; in other words a fusion at the normative level. The second issue concerns the suggestion of merging the two models of examination into one without necessarily eradicating their normative separation. In other words, the first suggestion answers the question of whether it is possible to tell negative and positive duties apart. The second suggestion addresses whether it is possible to also apply the negative-duty model of examination to positive duties.<sup>397</sup>

Dröge herself argues that independent of whether we apply a common 'interference' test, which she supports as an idea, the normative distinction should not be waived. Positive and negative obligations reflect two different functions of the State: as an aggressor or as a guarantor. In the first case, the individual seeks to defend himself/herself against the State, in the second one, he/she seeks to realise rights through the support of the State. There is thus a fundamental structural difference between an exercise of rights that is possible without State contribution and one which is only possible through State assistance. From this standpoint, namely from what the individual asks of the State (i.e. intervention or abstention), it is always possible to distinguish between positive and negative obligations.<sup>398</sup>

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<sup>394</sup> Ibid.

<sup>395</sup> D.Xenos, *supra* fn. , pp. 63-65;

<sup>396</sup> C.Dröge, *supra* fn., p. 344

<sup>397</sup> Ibid.

<sup>398</sup> Ibid., p. 370

The present thesis subscribes to Dröge's conclusion that it is normatively optimal to distinguish between positive and negative obligations, albeit for a different reason. In particular, as Dröge rightly argues, the doubts about the normative durability of positive obligations often stem from the fact that scholars isolate the concept and treat it as an abstract norm, detached from the human values it is supposed to serve. The focus is on the action or omission<sup>399</sup> which, depending on the circumstances and context, may appear as negative obligation or positive obligation or a fusion of both; and the integrity of the concept is ultimately placed in doubt. Dröge on the other hand, does not treat the obligation as a free-standing concept but as a means that regulates the relationship between the individual and the State. By taking, then, the standpoint of the individual she concludes that it is always possible to distinguish whether that person asks for State assistance or inaction to realise his/her rights; and that it is it is normatively flawed to fuse the two concepts together.

Reviewing this discussion from the perspective of the human subject, an approach that Dröge's account actually comes very close to, places the arguments brought forward from both sides in a more informative and transparent context. In particular, even though Dröge departs from the role of the State to reach the question of what the individual asks for, her analytical tool is the same as that which a departure from theories about the self would employ. We would, in other words, examine the concept of positive obligations from the standpoint of the human subject. Our inquiry would not, however, stop here as in Dröge's analysis, but we would also proceed to question what kind of a human being is the person who addresses the State. Both a rights-holder reminiscent of contemporary individualistic notions of autonomy, as the person in Dröge's account, and a rights-holder linked to relational views of the self (as is advocated for here) are expected to ask the State for both abstention and assistance. This is the case even if the emphasis would be placed on different State functions; the relational subject would mainly ask for assistance, the individualistic subject would prioritise abstention. A fusion of obligation at the normative level would require a subject located at the far end of each account respectively. In this sense, the thesis subscribes to Dröge's standpoint that it is always feasible to distinguish between the two.

If we now decide to use one umbrella term to describe all kinds of violations at the analytical level, the concept we choose, even if it is only meant as a technical term to test State compliance, nonetheless has a normative weight. Claiming, for instance, that all State

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<sup>399</sup> Ibid. p. 380

behaviours constitute 'interference' or should be dealt with as such, necessarily leads us towards individualistic conceptions of selfhood. From that perspective any kind of State behaviour is presumably intrusive. On the other hand, if we place the emphasis on human dependencies, then we would be led to the diametrically opposite result of the 'interference' model; namely of a 'failure to prevent' test to describe all kinds of violation. In fact, this latter approach is not unknown in human rights law. In interpreting the CRPD, which is arguably based on a relational perception of selfhood, the CRPD Committee shows some early signs of being favourably inclined towards this kind of interpretation. We will resume this part of our discussion in the next chapter.

In thus closing this section, the position taken here is that if we take the standpoint of the human subject and, in particular, if we adopt a moderate account of either the relational or individualistic view of the self, then it is always possible to distinguish between a positive and a negative obligation. Assuming we would nonetheless decide to choose one term to describe all kinds of violations, rather than 'interference' a relational view of the self would support a 'failure to prevent' model. In any case, however, and independent of whether or not one agrees with the substance of the position advanced here, what our discussion also illustrates is the value of adopting the human self as a basis for analysis. It allows us to both examine our most basic concepts with more awareness and to better predict and plan for their outcomes in practice. In the case of positive obligations in particular, we are capable of providing answers and be aware of the limitations we are going to impose. This allows us to steer our legal systems accordingly.

#### **4. The meaning and scope of positive obligations in human rights law**

If the concept of positive obligations has given rise to an extensive debate within human rights scholarship, it is the meaning and scope of those obligations that have proven most controversial. While in general it is accepted that positive obligations arise out of the general duty of the State to secure respect for human rights, when exactly this obligation arises, what kind of State action correlates with it and of what intensity have been the subject of extensive discussion. To a large extent this is attributable not only to the lack of a formal doctrine but also the tendency of prominent human rights mechanisms, such as the ECtHR, to merge together the question of the existence with the issue of fulfilment. The analysis becomes thereby rather confusing, since the answer to whether an obligation exists is given retrospectively, after the

State's performance has been assessed. A positive obligation thus arises as long as its fulfilment is not inconsistent with the interests of the community:<sup>400</sup>

“In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.”<sup>401</sup>

In practice, this rather ambivalent standard has led to inconsistent interpretations even by the Court itself of when a positive obligation arises.<sup>402</sup> The absence of a formal doctrine, the case-by-case approach followed by most monitoring bodies and their diverging tests to solve legal disputes have added to the ambivalence of a concept that lacks a firm theoretical standing. In analogous cases, for instance, on the duty to provide access to adequate education to persons with disability, the ECtHR and ESC Committee reached opposite verdicts.<sup>403</sup> Unsurprisingly, contributions at the scholarly level have mostly focused on systematising the multitude of positive obligations that lie dispersed within human rights law. The diversity of the suggested approaches arguably reflects the difficulty in finding a system within the current interpretation of the concept.<sup>404</sup>

Accounts theorising positive obligations are normally guided by two major concerns: first, to impose order on a concept that lacks disciplined analysis; and second, to enhance protection in areas that are currently marginalised. Since the content and scope of positive obligations have been extensively dealt with within the literature, this section will not engage in depth with each account separately. Instead, after outlining some influential accounts at the scholarly level and the main jurisprudential trends, the Chapter will build upon Dröge's approach in order to explain what exactly is wrong with the manner in which positive obligations are currently interpreted and applied in mainstream human rights law.

At a scholarly level, the definitions provided vary significantly across the different accounts with

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<sup>400</sup> L. Loukaides, “Personality and Privacy under the European Court of Human Rights”, in *Essays on the Developing Law of Human Rights*, Martinus Nijhoff publ., 1995, p. 90

<sup>401</sup> ECtHR, *Rees v. United Kingdom*, Appl. No. 9532/81, Judgment of 17 October 1986, par 37

<sup>402</sup> C. Dröge, for instance, discerns four approaches: first cases where the Court draws a clear distinction between positive and negative obligations; second, cases where a distinction is drawn but the Court nonetheless examines consecutively whether the same facts give rise to a positive or negative violation; third, cases where no distinction is drawn; and fourth, cases where a distinction is drawn but at the same time the Court departs from previous case-law providing conflicting interpretations regarding the nature of the obligation under examination, *supra* fn. p. 340

<sup>403</sup> Compare ECtHR, *McIntyre v. UK*, Appl. No 29046/95, Judgment of 21 October 1999 and ESC Committee, *International Association Autisme v. France*, Complaint No.13/2002, Decision of 4 November 2003

<sup>404</sup> See C. Dröge, *supra* fn. , p. 381

some scholars attaching the obligation to more abstract principles and norms, such as effectiveness or knowledge, others focusing on the content of the State action and others on the agent of the violation;. These definitions are then broken down into further subcategories. Additional common parameters cutting across many accounts is the procedural or substantial aspect of the protection afforded, as well as the proactive or remedial character of the expected State action; in other words, whether the State is asked to prevent the violation from happening or address its consequences.<sup>405</sup>

Among the more influential accounts is the one provided by Harris, O'Boyle and Warbrick who identify three interrelated contexts within which a positive obligation arises: “(i) the obligation to take steps to make sure that the enjoyment of the right is effective (ii) the obligation to take steps to make sure that the enjoyment of the right is not interfered with by other private persons and (iii) the obligation to take steps to make sure that private persons themselves take measures to ensure the effective enjoyment by other individuals of the right.”<sup>406</sup> Starmer's account of positive obligations distinguishes between a) the duty to put in place a legal framework which provides effective protection, b) the duty to prevent breaches in the context of intimate interests where fundamental rights are at stake or where the legislative framework cannot effectively protect the right, c) the duty to provide information and advice relevant to a breach, d) the duty to respond to breaches and e) the duty to provide resources to individuals whose rights are at risk.<sup>407</sup> A very influential account has also been developed by Sudre who divides positive obligations into those in which it is the State's omission that violates the right at stake and those in which third parties are allowed to interfere with other people's rights.<sup>408</sup> Xenos on the other hand distinguishes between positive obligations that arise from the State's implied knowledge of the violation either from previous incidents or in the context of private parties' interactions and from the State's express knowledge due to an express complaint or an identifiable threat.<sup>409</sup>

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<sup>405</sup> See for instance D. Xenos, *supra* fn. ; see also K. Starmer, “Positive Obligations under the Convention” in *Understanding Human Rights Principles*, (eds J. Jowell and J. Cooper, Hart publ., 2001, pp 150-157; see also A. Clapham, *Human Rights in the Private Sphere*, Clarendon Press, 1993, p. 345;

<sup>406</sup> D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, 1995 (see also 2014 2<sup>nd</sup> edition, p. 504), p. 284. As an example of the last category, the authors refer to the old case of *X and the Association of Z v. the United Kingdom* regarding the ban on political advertising, clarifying, however, that this last category is not more than a mere suggestion by the Commission

<sup>407</sup> Ibid. K. Starmer, *supra* fn., pp 139- 160

<sup>408</sup> F. Sudre, *supra* fn. p. 369-370; her taxonomy has gained much support within legal scholarship and comes close to Droge's model, which also contains, however, a third category

<sup>409</sup> D. Xenos, *supra* fn. , pp. 73-89



As regards the content and scope of the obligation, in general it is agreed that within the mainstream human rights framework the State is expected to put into place the tangible material and institutional conditions necessary to ensure the effective enjoyment of the right (legislative, administrative, judicial) both from a procedural and substantial perspective.<sup>410</sup> In peripheral human rights instruments, such as the CEDAW, the obligation often also touches upon the relationships involved in the protection of the rights. In its landmark decision in *A.T. v. Hungary*<sup>411</sup>, a domestic violence case, the Committee found that the State had failed to protect the physical and mental integrity of the applicant from her abusive husband on two different grounds: first the legal and institutional proceedings the State had undertaken were insufficient to address her situation and provide immediate relief, and, second, because of the failure to address the prevalent stereotypical attitudes about the role of women in society. While the Committee relied on separate articles to find each violation, we may read in the Committee's analysis an interconnection between the two. The failure to combat negative social stereotypes was understood to have indirectly nurtured the occurrence of the violence and also negatively impacted on the protection afforded to the applicant.<sup>412</sup> Nonetheless, the view that positive obligations may comprise anything more than the provision of material assistance to secure a right, such as fostering interactions as part of the obligation, has only sporadically been acknowledged in specific contexts<sup>413</sup> and is, in general, not treated as a core component of the

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<sup>410</sup> J-F. Akandji-Kombe, *supra* fn., p. 10; see also HRC, General Comment 31, par 8; M. Nowak, *supra* fn., pp. 519-520

<sup>411</sup> *A.T. v. Hungary*, Communication No 2/2003, Decision of 26 January 2005

<sup>412</sup> *Ibid.* “9.4 [...] In its general recommendation No. 21, the Committee stressed that “the provisions of general recommendation 19 ... concerning violence against women have great significance for women’s abilities to enjoy rights and freedoms on an equal basis with men”. It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. [...] In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized vis-à-vis the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.” [emphasis added]

<sup>413</sup> In the context of cases dealing with environmental nuisances and pollution, the Court has held that the scope of the obligation to protect the right to private life entails not only the necessary institutional arrangements but also securing the participation of the affected people in the decision-making process. “115. The Court points out that in a case involving State decisions affecting environmental issues there are two aspects to the inquiry which it may carry out. Firstly, the Court may assess the substantive merits of the national authorities’ decision to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual (see, *mutatis mutandis*, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 99, ECHR 2003-VIII).”, ECtHR, *Taskin and others v. Turkey*, Appl. No

obligation within mainstream human rights law.

How much State assistance is foreseen by the scope of the obligation and where exactly the limits lie in protecting and rendering the right effective is far from clear. This is normally decided on an *ad hoc* basis by weighing a variety of factors against each other, some stemming from general interpretative principles and others from practical limitations. A uniform set of criteria is, in general, not provided. For the ECtHR for instance, this depends, amongst other factors, on the situation in other Contracting States to the Convention, the State's margin of appreciation, the significance of the right at stake and also on the cost and availability of resources.

Many scholarly contributions have sought to concretise and systematise such factors. According to van Dijk, for instance, the principle of effectiveness is too ambiguous because the scale between minimum and maximum effectiveness is simply too broad to be of analytical utility. In his view, the scope of the obligation should be limited by accepting that a strong and direct link has to exist between the situation complained of and the effective enjoyment of the right; the scope of the obligation ought to encompass, thus, only those measures that are instrumental in the enjoyment the right.<sup>414</sup> An important contribution to framing the scope and limits of extant jurisprudence in more technical terms has recently been provided by Xenos, who to this purpose combines a qualitative criterion and a quantitative criterion: (1) the conceptual aspect of the human rights concerned; and (2) its negative impact on the individual, the minimum threshold of which is left, though, to the judges to decide. An inherent limit to the scope of any obligation is the availability of the State's resources, the intensity of which varies depending on whether the act complained of is taken in accordance or in defiance of the law.<sup>415</sup>

In terms of analytical structures, a variety of tests are available within human rights practice to assess whether the obligation has been fulfilled. Scholarly discussion has, in general, focused on the fair balance test, the proportionality test and the reasonableness test. The interest here is that they are often treated as holding the key to giving clarity to the notion of positive obligations and securing better protection. Lowest in the ranking is normally the fair balance test, first developed by the ECtHR. The main idea behind this test is to analyse the legal dispute through one uniform question: namely whether in protecting the right the State struck a fair balance between individual and community interest. The outcome seals the fate of the overall assessment: if the right balance was not struck, then it is assumed that a positive obligation of

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46117/99, Judgment of 10 November 2004, par. 115

<sup>414</sup> Van Dijk, *supra* fn.

<sup>415</sup> D. Xenos, p. 208

the specific scope did in fact exist and was also violated; if a right balance was not struck, then it is retrospectively acknowledged that no positive obligation with this content and scope existed at the outset. This approach of making the existence of the obligation dependent on its fulfilment has been heavily criticised for its lack of transparency and clarity.<sup>416</sup>

Many scholars see much potential in analysing positive obligations through the proportionality test, thus far applicable only to negative obligations. Such an evaluation would then consist of two steps: first, to decide if a positive obligation arises and, second, whether it was fulfilled.<sup>417</sup> Communal and individual interest would still be weighed against each other<sup>418</sup> but at least definition and contours would be dealt with separately and there would be more clarity and transparency in the applicable criteria, which would be common with negative obligations.<sup>419</sup> Proponents of this model invoke its technical supremacy against its rivals: the term 'fair balance' reflects, by definition, a less vigorous examination compared to the 'pressing social need' of the proportionality test, thus generating lower thresholds of protection.<sup>420</sup>

Other scholars have shifted their focus to 'reasonableness' models, initially associated with socio-economic frameworks such as the European Social Charter, but which are now considered also applicable to civil-political rights.<sup>421</sup> The distinct feature is the much wider time-frame

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<sup>416</sup> Van Dijk, *Theory and Practice of the European Convention on Human Rights*, pp. 5-19; C. Warbrick, *supra* fn., pp. 3-4 ;

<sup>417</sup> See in particular Koch; Sudre; van Dijk; Dröge cited earlier

<sup>418</sup> ECtHR, *Hatton and others v. the United Kingdom*, Judgment of 2 October 2001, par. 96

<sup>419</sup> Scholars more sceptical of this approach have primarily raised concerns over the difficulties in accommodating the technical question of 'prescribed by law' with positive obligations, as very often the duty to legislate may by itself be the subject of the obligation. For a discussion see Van Dijk "Are the States still Masters of the Convention", cited earlier, who suggests treating as positive obligations only cases where there is a total absence of legislation. In cases where the extant legislation entails restrictions or requires amendments it should be treated as a breach of negative duty; in those cases where the criterion provided for by law does not seem to apply, "one must conclude that the interference which consists in the non-fulfilment of an implied positive obligation, finds its clause in the law and is therefore provided by law", p. 26; For an analysis of the notion of the "law" see also P.van Dijk (ed), *Theory and Practice of the European Convention on Human Rights*, 4<sup>th</sup> ed., Intersentia, 2006, pp 344-345

<sup>420</sup> F. Sudre, "Les « obligations positives » dans la jurisprudence Européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, Vol.23 Issue 6, 1995, pp. 363-384 ; see also D. Spielmann, "Obligations Positives et Effet Horizontal des Dispositions de la Convention", in F. Sudre (ed), *L'interprétation de la Convention Européenne des Droits de l'homme*, Bruylant publ, 1998, pp. 133-174 ; see also D. Xenos, p.71

<sup>421</sup> On the applicability of the reasonableness test beyond the socio-economic field see in particular the Note prepared by the Secretariat, 'The Use of the "Reasonableness" Test in Assessing Compliance with International Human Rights Obligations', 1 February 2008, A/HRC/8/WG.4/CRP.1 which identified the use of reasonableness in all nine core human rights treaties, as in B. Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, Vol.11, No. 2 (2011), pp. 275-327, Griffey comments that: "The paper identified two common threads of 'reasonableness' in all treaties enlisting the principle: its use as a criterion 'relating to the time frame for carrying out an action' and 'for legitimate restrictions on rights' [...] Relevant to those obligations, the paper concluded: 'While the concept defies easy definition, one common feature among the different usages is the importance of assessing any policy measure in its context'; see also the statement by UN High Commissioner L. Arbour, that "The concept of 'reasonableness' of State action is a well-known legal concept and long used in

employed to assess a situation. A balance also takes place here. The main question posed, however, is whether the State has taken all necessary and appropriate steps expected to lead to the realisation of the right within a reasonably short time – with the exception of those obligations that are immediately applicable. While the State is in general expected to act promptly, if the right is too complex or places a heavy burden on the community interest a more extended time-frame may be applied. However, the urgency of the needs of the recipients must always be considered.<sup>422</sup> Scholars in favour of extending this test throughout human rights law see much potential in this wider time-frame, which seems capable of addressing legal issues that the 'all-or-nothing' approach of the previous tests leave unregulated.<sup>423</sup> Its wider scope and holistic assessment also “captures better the essence of non-discrimination”.<sup>424</sup> Counter-arguments include the ambivalence of the term 'reasonableness' and the relative lenience of the framework.<sup>425</sup>

From the standpoint of this thesis, what defines the meaning, scope and every other component of the obligation is the subject that human rights seek to bring to life once fulfilled; and to truly understand the logic behind the obligation we must, methodologically speaking, focus on the kind of human subject that dictates how we interpret and apply positive obligations. Analysing the different elements that constitute a positive obligations as technical terms, as many

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adjudication of civil and political rights.”, UN High Commissioner for Human Rights, Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the third session of the Open-Ended Working Group on the Optional Protocol to the ICESCR, Third session, 6 February 2006, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6011&LangID=E>

<sup>422</sup> An apt formulation has been provided by the European Committee of Social Rights: “... the State must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question. States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources. [...] when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. In connection with timetabling – with which other regulatory bodies of international instruments are also very concerned – it is essential for reasonable deadlines to be set that take account not only of administrative constraints but also of the needs of groups that fall into the urgent category achievement of the goals that the authorities have set themselves cannot be deferred indefinitely.” ECSR, *Marangopoulos Foundation for Human Rights v. Greece*, Decision of 6 December 2006, par. 221; ECSR, *International Movement ATD Fourth World v France*, Complaint No 33/2006, Decision of 5 December 2007; *European Federation of National Organizations working with the Homeless (FEANTSA) v France*, Complaint No 39/2006, Decision of 5 December 2007; See also the analysis offered by D. Harris, “Collective Complaints under the European Social Charter: Encouraging Progress?”, p. 16

<sup>423</sup> O' de Schutter, 'Reasonable Accommodation and Positive Obligations in the European Convention on Human Rights', in *Disability Rights in Europe: from Theory to Practice*, (eds) A. Lawson and C. Gooding, p. 41

<sup>424</sup> See I. Koch, *supra* fn. , p. 288

<sup>425</sup> See in particular the summary of discussions in B. Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' *Human Rights Law Review*, Vol.11, No. 2 (2011), p. 296

contributions have engaged with, can help to map the concept as it stands. It does not, however, by itself suffice to connect the pieces together and overcome the weaknesses identified within human rights practice, as many studies aim at. The key to this goal lies with the underpinning subject, which dictates the normative content each element acquires.

The better outcomes of, for example, the reasonableness test do not flow from its supremacy in terms of technicalities but from the philosophy about human nature many of the instruments applying it follow to interpret each of its steps. By way of illustration, within the framework of the ESC, in the case of *Autisme-Europe v. France*, the Committee was asked whether France had fulfilled its positive obligation to provide adequate education to children with autism. Guided by its “underlying philosophy of equal citizenship” the Committee included within its assessment of the obligation not only material considerations but also the goal of the social integration of the children and their dependence on family caretakers,<sup>426</sup> ultimately finding a violation.<sup>427</sup> This understanding of the meaning and scope of the obligation, which goes beyond a reductionist understanding in terms of material facilities and resources, had little to do with the temporal scope of the test.

To compare, in *McIntyre v. the United Kingdom*, when the European Commission of Human Rights was asked if the United Kingdom had secured adequate education for a girl in a wheelchair, the evaluation was narrowed to whether the State had “provided [access to] the educational facilities in a manner that is consistent with a practical and efficient use of resources and public funds.” At the end, it all came down to whether McIntyre could still adequately attend the curriculum despite not being able to “freely move around the building” and no violation was found. Her complaint about feeling marginalised compared to her peers was

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<sup>426</sup> See in particular the following extracts from the reasoning provided by the Committee: “The underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of “independence, social integration and participation in the life of the community”. Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. [...] States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.”, *supra* fn., par. 48 and 53

<sup>427</sup> *Ibid.* 54. In the light of the aforementioned, the Committee notes that in the case of autistic children and adults, notwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education for persons with autism.[...] Nevertheless, it considers, as the authorities themselves acknowledge, and whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled. It is also established, and not contested by the authorities, that there is a chronic shortage of care and support facilities for autistic adults”, par. 51

overlooked.<sup>428</sup> If we transposed the reasonableness test to the ECHR framework without any further changes, it is doubtful whether the test by itself would achieve anything more than the installation of an elevator against its cost along a more expanded time frame. Thus the key to unlocking positive obligations and theorising in a manner capable of generating the desirable solutions that one test seems capable of achieving, does not lie in the test as such; but with the image of human nature we rely on when we design and apply the duties that the State owes to the rights-holder.

## 5. Explaining positive obligations through the lens of the human self

For the purposes of explaining positive obligations through the lens of the human self, of particular value is the very comprehensive account developed by German scholar Dröge, who uses as a reference the ECHR framework.

Her work is particularly relevant to the present thesis for two reasons. First, because from a methodological perspective her account employs the perspective of the rights-holder to analyse positive obligations – even if Dröge herself draws from the wider political discourse about the role of the State and not the philosophical discourse about the self. Second, in employing the lens of the subject to analyse obligation, she takes as granted the vision of the self that the ECHR framework she relies on projects. Her account is thus not only of methodological value but offers also a suitable basis for us to analyse where exactly the problems lie with an individualistically autonomous rights-holder. For reasons of comprehension we will first briefly present her account before extracting the necessary tools to explain what a focus on the human self brings to the fore, and where an individualistic framework of positive obligations seems to go wrong.

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<sup>428</sup> “The Commission notes that the applicant suffered frustration at not being able to move freely around the building of her own will, but it cannot be said that in the present circumstances, given the alternative arrangements made, the LEA's refusal to install a lift denied her "the right to education". [...] The Commission notes that the LEA carefully considered the request for a lift by arranging for a technical report to be carried out on the viability of such an installation. Given the fact that the school is a small, primary school, a sum of 47,000 is large, especially when balanced with the other demands of the area's schools and the particular needs of the applicant. The Commission does not accept that, in the light of all the other measures taken by the LEA to assist the applicant, that the refusal to provide a lift at Sudbourne School can be said to be disproportionate to that aim.”  
Supra fn.

### a. Dröge's account of positive obligations under human rights law

Dröge's departure point is that positive obligations always designate a protective duty for the State. Whereas negative obligations address the State as a violator, positive obligations address the State as a guarantor. To define positive obligations and differentiate between the two, the crucial question to ask, she argues, is what the individual wants from the State; if the individual asks for the State's assistance to realise the right, then a positive obligation is at stake, if the individual asks the State to abstain then a negative obligation arises.

Having established that, she then divides positive obligations into two broad categories, using as a criterion "the cause" responsible for the violation: a) positive obligations of a horizontal dimension, where the cause can be attributed to a prior immediate action by a private party; and b) positive obligations of a social dimension, where the cause cannot be attributed to the immediate action by either the State or a private party. Situations in which the obligation to take action is attributable to a prior action by the State, she explains, do not give rise to authentic positive obligations. They are a response to the initial violation of a negative duty and what the individual is often really asking for is not a positive action, but a discontinuation of that behaviour, i.e. an abstention:

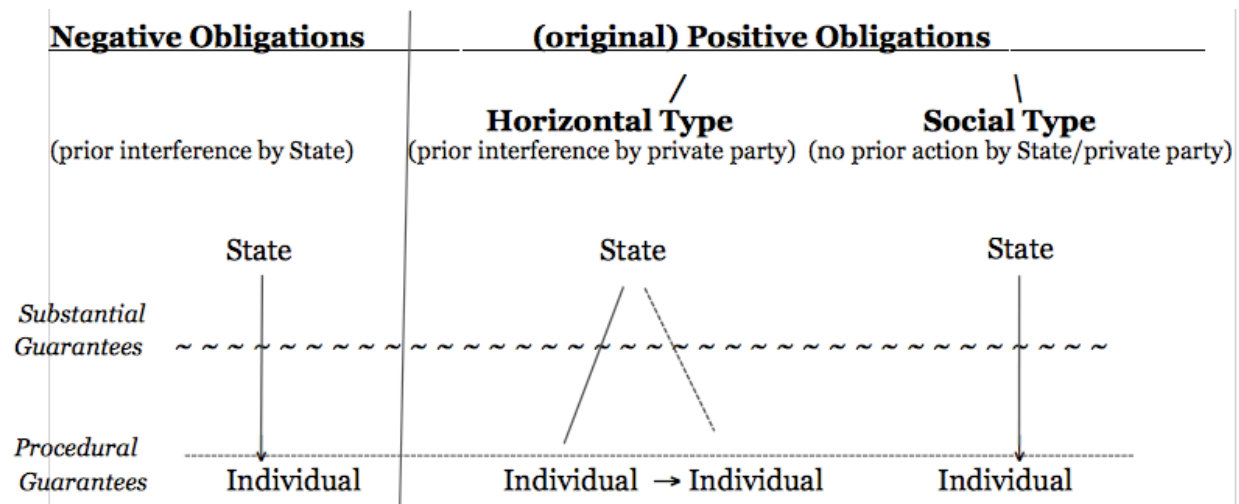
"Accordingly, two groups of positive obligations can be made out: the first concerns the so called *horizontal dimension*, i.e. the dimension of human rights protection between private parties (as opposed to the vertical dimension which concerns the relationship between the rights holder and the State). It is the obligation to protect the individual against interference by another private party.[...] However, not all positive obligations are related to an interference by another private party; many claims by individuals or groups only concern the relation between the right holder and the state. There must therefore be another group of positive obligations.... This second group of positive obligations is much wider and manifold. It encompasses all human rights violations which result from a cause that can pinpointed neither to a positive action by the State nor to the behaviour of a private party... They are claims of the individual to help and assistance by the State to realise his or her full autonomy and freedom. ... these obligations shall be called positive obligations of a *social dimension* to differentiate them from positive obligations of the horizontal dimension."<sup>429</sup>

In addition to this distinction, Dröge divides obligations into substantial and procedural ones, a

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<sup>429</sup> Dröge, *supra* fn. , p. 84; see also Xenos, *supra* fn. who, using Dröge's structure, divides positive obligations that are indirectly attributable to the State and positive obligations that are neither directly nor indirectly attributable to the State. He suggests renaming this last category as those concerning vulnerable categories of persons. However, as will be analysed below, Xenos' amendments do not necessarily improve Dröge's schema because he introduces, amongst others, the element of vulnerability, which by itself requires further clarification.

classification that she extends to both positive and negative obligations. These do not, however, constitute a separate category of obligations, but should be understood as the material and procedural guarantees that traverse both types of duties.<sup>430</sup> Schematically, Dröge's classification of positive obligation would as a whole look as follows:



At a normative level, Dröge does not rely on theories of the self, but grounds her schema in what she calls a “multidimensional understanding of fundamental rights”, which essentially combines elements of different constitutional theories linked to the origin of the right at stake.

<sup>431</sup> “Several human rights theories complement each other so that one can speak of a plurality of human rights understandings and a true multidimensionality of their protective scope”.<sup>432</sup>

She embeds her theory in a broader evolution from a simplistic liberal, negative way of thinking about rights to a more sophisticated and holistic one that embraces social theories.<sup>433</sup> The development of positive obligations, she explains, reflects the increasing complexity of human rights thinking and the acknowledgment that human rights can no longer be limited to a minimalist and negative understanding of freedom. “A more holistic concept of freedom has been accepted, a concept that focuses not only on the power a person already possesses, but rather on empowerment itself, on the autonomy of the individual, whereby autonomy may be described as self-determination, independence, free will, freedom of choice”.<sup>434</sup> Positive

<sup>430</sup> Dröge, pp. 6-7; p. 187

<sup>431</sup> Ibid. pp. 187-188, p. 211, p. 220

<sup>432</sup> Ibid. p. 383

<sup>433</sup> pp. 200-215

<sup>434</sup> Ibid. pp. 84- 85



obligations, she argues, are always directed at maintaining or restoring the person's autonomy. Whereas horizontal obligations protect the individual from threats by others, social obligations protect the individual from threats arising out of overwhelming social power.

To have, however, durability as a normative category, any account of positive obligations must take into consideration the State's capabilities and, in particular, resources when it comes to defining the scope and limits.<sup>435</sup> The scope of the obligation, she argues, can accordingly “only go so far as to ensure the autonomy of the individual.”<sup>436</sup> Positive obligations, she explains, should be understood as consisting of three concentric circles: on the outside lies the duty to provide escape routes, in the intermediate circle the duty to prohibit attacks by private parties and, finally, in the centre lies, as a last resort, the provision of material and financial assistance. What kind of action is required depends on the balance of two parameters that are inversely proportional to each other: the degree of help the individual needs to overcome the threats, and the intensity of the restraint on the individual's freedom of choice.<sup>437</sup> The more restricted the freedom of choice, the denser the obligation. If, however, freedom of choice is restrained in such a way that there is still a margin of action for the individual, then the State can choose less dynamic means to provide escape routes from harm. In cases, however, of very severe violations that threaten the core of the right or of human dignity, then the obligation may reach as far as providing an individual with an existential minimum (social dimension) or adopting criminal sanctions (horizontal dimension).<sup>438</sup>

Some positive obligations, she argues, entail, however, costs that could make a completely uniform standard difficult to achieve. Horizontal obligations may often require a certain organisational structure on the part of the State, while social obligations will most often require direct material and financial investments. To render their implementation feasible it is crucial to employ the margin of appreciation and adjust positive demands to the situations of countries that may be less privileged.

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<sup>435</sup> Ibid. p. 391

<sup>436</sup> Ibid. p. 388; Dröge invokes a series of further normative and interpretative principles to designate the scope of the obligation. While the general principles of effectiveness and of dynamic interpretation are used to expand the scope of the obligation, the principles of historic interpretation, systematic interpretation and the wording of the treaty serve to limit the scope and the comparative interpretative approach serve to limit it. In addition, she argues, the normative nature of obligations of due diligence further narrows their scope as they can be limited through the requirement of a concrete and real threat or risk for the individual.

<sup>437</sup> Ibid. p. 308:

<sup>438</sup> Ibid. p. 389

## **b. The methodological framework for analysing positive obligations on the basis of the human self**

Dröge's analysis in explaining and systematising positive obligations is particularly insightful and valuable on a number of grounds. Of greatest significance for the purposes of the present study, however, are two of the methodological tools she relies on to develop her account: first, the standpoint of the rights-holder and, second, the reliance on the notion of autonomy to define their content, scope and limits.

In particular, even though Dröge embeds her account in liberal and social theories of the State, when it comes to defining the role of the State and what it owes its citizens, she practically reverses the lens and adopts the perspective of the rights-holder: the purpose of rights, she argues, is to ensure a person's autonomy and the role of the State is defined by what the individual asks for. Positive obligations thereby emerge as claims for assistance from the State to ensure autonomy, while negative obligations are always claims for abstention.

On this basis, she employs as a criterion the 'cause' of the harm in order to identify two situations in which positive obligations to provide assistance arise: first, when the individual's autonomy is threatened by a third private party; and, second, when the individual's autonomy is threatened by the 'overwhelming social power'. She translates these into two types of situations: first, when the cause of the harm is attributable to a prior behaviour by a private party and, second, when the cause of the harm is not attributable to anybody's immediate prior actions.<sup>439</sup> She actually argues that there is a third situation in which a human rights violation can arise, namely when there is a prior immediate behaviour by the State, but here, she argues, authentic positive obligations are not applicable.

The tool she uses to categorise obligations, namely the cause of the harm, is in fact a question phrased from the perspective of the individual: who does the person feel threatened from? Positive obligations thus do not arise in abstractly, but under those contexts in which the subject himself/herself feels harmed and overpowered.

What merits closer examination at this point is Dröge's decision to leave out situations in which

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<sup>439</sup> While Dröge often uses the term "prior immediate action", the term is used within the meaning of behaviour, i.e. it encompasses both actions and omissions *stricto sensu*.

the cause of the harm is directly attributable to an immediate prior State behaviour. In her view this kind of situations do not qualify as positive obligations because they do not constitute genuine calls for assistance but for omission; the applicant asks the State to discontinue an unwanted State behaviour. She concedes, though, that a too formalistic approach towards action or omission should also not be followed. There may be cases where the person formally asks the State for omission, but from a material point of view it is a positive obligation. One such example is when the State discontinues a welfare benefit. "Ultimately, the assessment of the claimant relies on the fact that his/her right to a minimum standard of welfare and human dignity can only be guaranteed through the assistance of the State".

In his analysis, Xenos supports Dröge's position by arguing that what is essentially at stake are positive measures that are requested when a person is in the sphere of control of the State, for instance detention. He argues that while these are often treated as positive obligations, they ought instead to be viewed as the necessary legal safeguards a State has to take to justify a negative interference. They are structurally different from positive obligations, because there is a direct causal connection between the harm and the State. Consequently, the limits of practicalities to define their scope do not apply. He illustrates his position through the example of disabilities. There is a distinct differentiation, he explains, between providing appropriate facilities to disabled persons inside a prison context and outside. In the first case, he argues, "there is a causal link between the harm complained of and the act of detaining an individual without providing appropriate facilities. Such a causal link (directly attributed to the State) is spectacularly absent in the claims of human rights protection of disabled individuals at large".<sup>440</sup> For Xenos, a positive obligation, horizontal or social, can arise within such a context only if there is a 'new situation' where additional human rights are involved (eg. killing by another inmate).<sup>441</sup> From the standpoint of this thesis, however, this last category of cases, where a person asks for assistance while under the control of the State (i.e. cases where the cause of the harm is directly attributable to a prior lawful State behaviour), can also give rise to positive obligations. The

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<sup>440</sup> Xenos grounds his account within a wider social movement through which the individual emerges as an atomic unit with a participatory ability to secure and assert human rights in all circumstances. Positive obligations, he argues, purport to secure human rights in those contexts where the individual interacts with other private parties. On this basis, and using as a criterion the State's knowledge to define their meaning and scope, he distinguishes between positive obligations in which the cause of harm is attributable to a prior interference by a private party and positive obligations where the rights-holder is vulnerable. In the latter, he argues, what the individual effectively asks is a redistribution of the State's resources; it is thus the conflict between an individual's right against the rights of the community that trigger the State's responsibility to act. For a detailed analysis see in particular Chapters 2 and 3.

<sup>441</sup> Xenos, *supra* fn., p. 125

analytical premise that Xenos relies on will be examined closer in the next section. The focus here will be on the normative justification of our position.

In particular, both Xenos and Dröge rightly argue that not all calls for positive measures constitute positive obligations. Some positive measures, for instance the planning of an anti-terrorist operation by the police to prevent civilian casualties,<sup>442</sup> are simply procedural safeguards connected to negative obligations. Indeed, in those cases the applicant does not actually ask the State to assist him/her to realise autonomy, but to abstain from interfering altogether. Where we disagree, however, is also ruling out situations where the person asks for assistance while within the sphere of control of State (e.g. prison, mental institutes, military bases, immigration centres, and so on).<sup>443</sup> In such cases, a need for assistance does actually arise. The individual's ability to realise autonomy is under the State's direct influence and the individual naturally expects the State to act as a guarantor; in the same way as when his/her ability is circumscribed under the influence of a private party or social disadvantage.

To argue that under these circumstances the person only asks for an omission (i.e. discontinuation of the act) and that the State accordingly acts only as an aggressor unnecessarily assumes that there is always an insurmountable tension between being in the sphere of the State's control and autonomy. Whether this is the case, however, depends on the normative content we give to the notion of autonomy and the self. It does not relate to the generic methodological question of distinguishing under what circumstances a person is likely to be asking for assistance to realise autonomy.

Likewise, the questions of whether the scope is limited by practicalities or not, whether there is State responsibility for dependencies that lie beyond the sphere of State control or not, are outcomes of the image of the self and autonomy we rely on. If for instance our mainstream image is a child, an elderly person or a person in a wheelchair, then many of these analytical assumptions are no longer applicable. But there is no normative justification for excluding in advance the possibility of exercising autonomy within such a setting, nor that the individual may be looking to the State as a guarantor at that moment. Thus, for the purposes of this thesis, what we retain is that positive obligations can arise under three circumstances in which the person may be asking for assistance: first, situations in which the person asks for assistance to realise autonomy due to a cause directly attributable to a prior State behaviour; second,

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<sup>442</sup> ECtHR, *McCann and others v. the United Kingdom*, Appl. No 18984/91, Judgment of 27 September 1995

<sup>443</sup> Xenos, *supra* fn., p. 125

situations in which the person asks for assistance to realise autonomy due to a cause directly attributable to a third private party; third, situations in which the person asks for assistance to realise autonomy due to a cause which is not directly attributable either to a private party or the State. Whether they do or do not arise will depend on the definition of autonomy or selfhood we adopt.

Finally, when it comes to outlining the scope of the obligation, Dröge argues that this ought to be based amongst others on the underlying principle of autonomy; what the State is expected to do can only go as far as ensuring the subject's autonomy. In her view, this translates into the State having to provide some standards of welfare that make autonomy possible, considering its available resources; unless the core of the right or human dignity are at stake. We agree with Dröge that the scope of the obligation ought to be defined by autonomy and that the State is expected to provide some minimum standards of well-being that make autonomy possible. What, however, this minimum threshold of well-being consists of (e.g. material welfare or also social welfare) and what kind of assistance the State is expected to provide all depend on the normative content we give to the notion of autonomy and the self.

Overall, applying the lens of human self to analyse positive obligations generates the following generic analytical tools. Positive obligations ought to be understood as calls for assistance to realise one's autonomy. Taking the perspective of the human subject we may distinguish three circumstances under which the person is likely to ask for assistance from the State to realise his/her autonomy. In terms of content and scope, the State is expected to provide some minimum standards of well-being that make autonomy possible, the precise content and limits of which depend however on the normative content we give to autonomy.

## **6. The individualistic framework of positive obligations in theory**

On the basis of this analytical frame, we can now review how an individualistic approach to the self would fill in each one of these steps and what kind of positive obligations would emerge therefrom in theory and practice. To this purpose, we will return to Dröge's normative account. She explains positive obligations on the basis of what she accurately perceives as the normative viewpoints about autonomy and freedom within human rights law in general and the ECHR framework in particular. "A more holistic concept of freedom has been accepted, a concept that

focuses not only on the power a person already possesses but rather on empowerment itself, on the autonomy of the individual, whereby autonomy may be described as self-determination independence, free will, freedom of choice. It is the freedom to have alternatives...". This more holistic conception of freedom and autonomy that Dröge describes as emerging through human rights law relates to the individualistic conception of the self. While it is more holistic when compared to early individualism, which Dröge refers to as a "merely liberal, negatory freedom", her definition of autonomy equates autonomy with independence and effectively leaves out relationships. Autonomy means freedom of choice, independence, "the absence of obstruction on roads along which a man can decide to walk."<sup>444</sup>

Her approach is in no way subject to criticism. At the outset, already, Dröge explicitly states that her aim is to be to systematise positive obligations as they currently stand into a normative category, rendering them thus more transparent and uniform.<sup>445</sup> In other words, she does not seek to normatively challenge mainstream understandings of positive obligations within human rights jurisprudence, let alone question the underlying vision of freedom and autonomy. Instead, she seeks to explain and justify their application in light of a specific conception of autonomy. Her account offers, in this sense, a very insightful analysis of positive obligations as they flow from an individualistic image.

If we now review how she analyses positive obligations, then we can see how in each step within this schema this image of the subject is reflected and defines the answers provided. In particular, at the philosophical root of this scheme lies the image of the individualistic subject whose autonomy must be protected through rights. Autonomy is thereby understood in terms of independence and freedom of choice. Contrary to rugged individualism, the person here depends on the State to provide the necessary material and institutional conditions that make autonomy possible. Whether this person is nonetheless also presumed to naturally enjoy some degree of self-sufficiency is open to discussion, as will be analysed below. Fostering relationships and sociability in general are absent from this definition of autonomy. The emphasis on independence indicates that the presence of fellow humans will most likely be perceived as an obstruction to autonomy rather than a facilitator. On this general basis then, how an individualistic framework of human rights structures positive obligations is laid out below.

Positive obligations are understood as claims for assistance to make autonomy possible, either

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<sup>444</sup> I. Berlin as in Dröge, *supra* fn., p. 386

<sup>445</sup> *Ibid.* Dröge, p. 379

by restoring or establishing it. It is thereby understood that as long as the person can attain a minimum threshold of material welfare, autonomy will be ensured.

The next question, then, is in what contexts can such an obligation arise? According to Dröge there are two contexts; according to the position taken here there are three. In particular, as noted earlier, the answer to this depends on the normative content we give to the concept of autonomy.<sup>446</sup>

From the standpoint of this thesis, excluding situations where the person is structurally speaking under the State's direct control would emanate from a deeply individualistic understanding of autonomy; one that views the state of being under the direct responsibility of the State as disempowering by definition. Autonomy in the meaning of independence would simply not be possible in this context unless the whole regime of control were lifted, which is also why Xenos appears to describe the situation as an ancillary to a negative obligation. The case-law of human rights mechanisms, however, reveals a more moderate understanding of individualistic autonomy, one that views the possibility of some degree of independent existence and freedom of choice even within the limitations of such a context.<sup>447</sup> While the provision of material welfare will not necessarily unlock as many choices to the recipient as they would presumably enjoy outside the prison context, it does not mean that the possibility for autonomous functioning does not exist as such. In fact, even Dröge and Xenos seem to be allowing for some leeway by arguing that in the end what matters most is a material assessment of the situation and what the individual precisely asks for; or that a 'new situation' may also allow for positive obligations to arise within this context.

As for Xenos' suggestion, that a 'new situation' may arise, it is hard to discern when this is the case. Xenos himself mentions as an example ill-treatment by other inmates. In cases, however, where 'social assistance' is at stake, the boundary between old and new is far less clear. Xenos' approach appears to presume that in old situations needs are already known beforehand, in contrast to 'new situations'. However, if we apply this model in practice, this would mean that in the case of a disabled prisoner, for instance, a positive obligation would arise if the disability

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<sup>446</sup> See in particular the analysis offered by L. Clements, "Disability, dignity and the cri de coeur", *European Human Rights Law Review*, Vol. 6, 2011, pp. 675-685

<sup>447</sup> See in particular the landmark case of *Dickson v. the United Kingdom* (Grand Chamber), Appl. No. 44362/04, Judgment of 4 December 2007 about conjugal visits, in which a violation of Article 8 ECHR (private and family life) was found on account of the failure to provide access to artificial insemination facilities within a prison context. The Court held amongst others factors that: "prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention." par. 67

manifests itself after being imprisoned, while if he/she enters in prison as already disabled then there is a negative obligation. Given that Xenos also concedes that the scope of the former is restricted by practicalities while the latter is much wider, if both are in prison at the same time then the first prisoner would have a much weaker claim on accommodation compared to the second; an outcome which is not supported by extant human rights jurisprudence. Instead of seeking to draw a line between the different kinds of claims, it seems both normatively and analytically consistent with extant jurisprudence to treat them as falling under the same umbrella of calls for assistance while being under the direct responsibility of the State.

On this normative basis, we may discern within an individualistic framework three situations in which positive obligations are likely to arise. First, when the person is unable to attain this minimum threshold of welfare because he/she is under the immediate control or responsibility of the State. While in most cases this will involve a restriction of the applicant's liberty physically speaking, this need not always be the case.<sup>448</sup> The crucial criterion seems to be whether due to prior State behaviour the applicant's ability to realise autonomy by his/her own means effectively lies in the hands of the State. Positive obligations aim, then, to empower the individual to pursue an autonomous existence even under such circumstances. In the second case, he/she is unable to attain this threshold because he/she is under the negative influence of a private party and positive obligations aim to ensure autonomy by protecting the subject from the threatening behaviour. In the third case, as Dröge convincingly argues, nobody has actively harmed the individual but the person is at a social disadvantage in attaining this minimum threshold; he/she is threatened by the collective social power. The State steps in to empower the individual to realise his/her autonomy. Analytically speaking, the first category covers calls for assistance where the cause of the harm can be directly attributed to the State's immediate prior behaviour,<sup>449</sup> the second where a person is overpowered by a private party, and, in the

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<sup>448</sup> In the case of *MSS v Belgium and Greece*, it was acknowledged that given the overall situation in the country that offered no kind of protection to asylum-seekers, the latter were practically under the effective control of the State for as long as their claim was pending, *MSS v. Belgium and Greece* (Grand Chamber), Appl. No. 30696/09, Judgment of 21 January 2011

<sup>449</sup> While in most cases it will be a prior action (eg detention) there can be cases where the cause of the harm is directly attributable to the State's passivity (eg. delay in processing asylum-claims as a result of which the person found himself in a situation of extreme poverty). See in particular ECtHR, *Budina v. Russia*, Appl. No 45603/05, Decision of 18 June 2009, "The Court cannot exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity (see *O'Rourke v. United Kingdom*, no. 39022/97, 26 June 2001, where the Court held that the applicant's suffering, notwithstanding that he had remained on the streets for 14 months to the detriment of his health, had not attained the requisite level of severity to engage Article 3 and had, in any event, not been the result of State action rather than his own volition as he had been eligible for public support but had been unwilling to accept temporary accommodation and had



third category, the cause of the harm cannot be directly attributed to anybody, to neither immediate prior State nor private party behaviour.<sup>450</sup> In all three cases we can see how the subject determines the exact meaning of positive obligation on the basis of access to material welfare and the need to repel the threatening others.

As regards the scope and content, given that autonomy equals independence and access to a minimum material welfare, positive obligations consist, accordingly, of institutional, financial and other material forms of assistance that aim to enable the individual to overcome these threats and attain this minimum level. Different nuances of obligations are thereby provided depending on the degree of help the individual needs and the intensity of the restraint on his/her freedom of choice. The higher the restraint and the lesser the possibilities of escape, the more concise the obligation and the higher the demands on the State. While the precise factors that are taken into account to measure the scope of the obligation vary across the different schemes, a common limitation is the issue of cost. Given that autonomy is understood as access to material welfare and assistance is provided by means of goods and services, it is only natural that the costs entailed and the availability of the State's resources can place a legitimate limitation on the scope of the assistance a State is expected to provide.

A final observation before closing this part of the discussion, concerns Xenos' suggestion to substitute the 'social' obligations in Dröge's scheme with 'vulnerability'. While this suggestion is also of normative significance, it is dealt with here because he also invokes analytical elements in order to justify it. This category, he argues, would encompass all entitlements by persons who

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refused two offers of permanent accommodation; also see, *mutatis mutandis*, *Nitecki v. Poland*, no. 65653/01, 21 March 2002, where, in rejecting the applicant's complaint about the State's refusal to refund him the full price of a life-saving drug, the Court noted while Article 2 might be engaged if the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally, in this case 70% of the drug price had been compensated by the State and the applicant only had to stand for the outstanding 30%)." see also Dissenting Opinion of Judge Sajó, in *MSS v. Belgium and Greece* (Grand Chamber), Appl. No. 30696/09, Judgment of 21 January 2011: "The Court seems to indicate that the welfare obligation arises in respect of vulnerable people *only* where it is the State's passivity that causes the unacceptable conditions (*"the ... authorities ... must be held responsible, because of their inaction, for the situation in which he has found himself for several months"*). [...] Perhaps, without delays in the asylum procedure and/or by affording asylum-seekers a genuine opportunity to take care of themselves (e.g. by effectively engaging in gainful activities), there would be no State responsibility for the situation[6]. Even if the Court is not tempted to follow the path of the welfare revolution, an odd situation will arise. For example, the mentally disabled, vulnerable as they may be, will not be entitled to the care of the State as their vulnerability is attributable to nature and the conditions causing their suffering and humiliation are not attributable to the passivity of the State. Unlike this undeniably vulnerable group, however, asylum-seekers will be entitled to government-provided services. In terms of vulnerability, dependence, and so on, the mentally disabled (and other vulnerable groups, whose members are subject to social prejudice) are in a more difficult situation than asylum-seekers, who are not a homogeneous group subject to social categorisation and related discrimination. The passivity of the State did not cause the alleged vulnerability of the asylum-seekers; they might be caught up in a humanitarian crisis, but this was not *caused* by the State, although the authorities' passivity may have contributed to it"

<sup>450</sup> Ibid. see in particular *Budina v. Russia*.

require direct State assistance on account of their own personal vulnerability, such as biological features, or financial or social status. It would thus be differentiated from obligations that are owed to 'everyone', namely "obligations examined over the failure of its agents to protect 'everyone' (including also vulnerable individuals) from acts of interference by a non-state actor or in those exceptional circumstances in which individuals are legitimately placed under the control of the state".<sup>451</sup>

While his study in many respects contributes to the discussion of positive obligations and clarifies Dröge's classification through a wide range of examples, this specific suggestion is not endorsed here. From an analytical perspective, the reasons are the same as explained above regarding the use of the term vulnerability in the human rights context; in particular given that within the human rights context the term vulnerability has been used inconsistently.<sup>452</sup> In addition, there is no reason why vulnerability should be assumed to be absent or without a normative significance in the other two categories. In addition, if we rely on vulnerability to better define the final category, as Xenos suggests, and at the same time accept his argument then in this last category there is no direct causal link between harm and State and the scope of the obligation is more limited, then we end up justifying through the vulnerability attribute a lesser threshold of protection. Further to that, while Dröge is consistent in grounding her analytical structure on the basis of the agent to whom the cause of the violation is attributable, the vulnerability suggestion introduces for the third category a separate qualifier that does not match the other two.

## **7. The individualistic framework of positive obligations in practice**

Once this theoretical scheme of positive obligations based on an individualistic subject is turned into practice, one of the most striking, and probably most alarming, findings is the wide disparity in the protection afforded across the three categories of positive obligations. Human rights protection seems to diminish drastically as we move from situations where the cause of the harm is directly attributable to the State or a private party towards the last category, where the cause of the harm is not directly attributable to anybody.

This kind of outcome has been heavily criticised at the scholarly level. Summarily described,

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<sup>451</sup> Xenos, *supra* fn. pp. 142-143

<sup>452</sup> See Dissenting Opinion of Judge Sajo in *MSS v. Belgium and Greece*, *supra* fn.

what seems to be wrong is that the outcomes are morally counter-intuitive. It is within this third category that we find claims for State assistance by applicants representing some of the most disadvantaged segments of the population. Next to the moral uneasiness for marginalising those who seem most in need, the manner in which this is done also appears to be arbitrary and inconsistent.

To better illustrate this, we can take as a test-case the jurisprudence of the ECtHR and analyse it in accordance with the above-described framework. To this purpose, it might be useful at this stage to re-name the three categories, both for reasons of functionality and to better match them with current human rights practices. Instead of horizontal, social and so on as Dröge suggests, we will refer to them as positive obligations of three categories: a) the first category covers cases where the cause of harm is directly attributable to a State behaviour; b) the second category comprises cases where the cause is attributable a private actor; and c) in the third category the cause of the harm cannot be directly attributable to anybody. This characterisation is also optimal to avoid the confusion that Dröge's terminology may incur. While Dröge clearly states that positive obligations of the 'social dimension' are not restricted to socio-economic rights, one cannot help but make this association.

If we now categorise claims for positive State action that the ECtHR has dealt with accordingly, then typical cases which fall within the first category are detention cases, where the person complains about the inadequacy of the facilities within the enclosed environment, such as the unhygienic conditions inside a migrant detention centre,<sup>453</sup> the availability of disability facilities in a police station,<sup>454</sup> the poor living conditions within a remote care home<sup>455</sup> or the absence of practical measures to enable voting within a prison.<sup>456</sup> Cases representative of the second category most often concern acts of violence committed by a third private party, such as the failure by the social services to protect a child from domestic violence,<sup>457</sup> the failure to criminalise the sexual assault of a mentally disabled girl,<sup>458</sup> or the failure to take operational measures and stop harassment by a teacher.<sup>459</sup> Other common cases are the so-called environmental cases such as exposure to health risks<sup>460</sup> and noise nuisance<sup>461</sup> caused by the

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<sup>453</sup> ECtHR, *R.U. v. Greece*, Appl. No 2237/08, Judgment of 7 September 2011

<sup>454</sup> ECtHR, *Price v. the United Kingdom*, Appl. No 33394/96, Judgment of 10 July 2001

<sup>455</sup> ECtHR, *Stanev v. Bulgaria* (Grand Chamber), Appl. No 36760/06, Judgment of 17 January 2012

<sup>456</sup> EComHR, *Patrick-Holland v. Ireland*, Appl. No 24827/94, Judgment of 14 April 1998

<sup>457</sup> ECtHR, *A. v. the United Kingdom*, Appl. No 25599/94, Judgment of 23 September 1998

<sup>458</sup> ECtHR, *X and Y v. the Netherlands*, Appl. No 8978/80, Judgment of 26 March 1985

<sup>459</sup> ECtHR, *Osman v. the United Kingdom*, Appl. No 23452/94, Judgment of 28 October 1998

<sup>460</sup> ECtHR, *Taskin and others v. Turkey*, Appl. No.46117/99, Judgment of 10 November 2004

activities of private industries. Typical examples of the third category normally include complaints for failure to provide some minimum standards of care, for instance access to adequate health care treatment to chronically-ill persons,<sup>462</sup> funding for an expensive medicine needed by an elderly person<sup>463</sup>, housing for the poor,<sup>464</sup> the accessibility of various administrative buildings, educational institutions, social housing and the public space provision for persons with reduced mobility,<sup>465</sup> financial assistance to a destitute mother,<sup>466</sup> but also failure to put in place the legal framework to protect the matrimonial rights of a child born out of wedlock.<sup>467</sup>

In terms of human rights protection, claims for assistance that fell within the context of the first category were almost always vindicated by the Court; applicants whose claims fell within the second category in general have high chances of success, in particular when they were considered 'vulnerable'; in the third category, on the other hand, even for members of otherwise vulnerable groups the chances of success were minimal. The wider disparities appear thereby when administrative (operational) measures are requested in terms of direct material and financial assistance. In the third category all of the above-listed requests were dismissed.

The vigorous scholarly criticism of the failure towards the third category, reflects the moral counter-intuitiveness of the outcomes. In a nutshell, the main criticism is that human rights law seems to fail those who are most in need. At the analytical level, ample has been written about the inconsistencies in the application of positive obligations across the three categories. In analysing these disparities at both the normative and analytical level, the scholarly discussion in general seems to revolve around two interrelated elements: first, the normative supremacy accorded to the protection of human rights in the context of deprivation of liberty, reflected in the first category; and second, the role of cost as a legitimate boundary, in particular in the third category. Direct responsibility, however, is often attributed to the lack of judicial vigour to

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<sup>461</sup> ECtHR, *Moreno Gomez v. Spain*, Appl. No 4143/02, Judgment of 16 November 2004

<sup>462</sup> ECtHR, *Pentiacova and 48 Others v. Moldova*, Appl. No 14462/03, Judgment of 4 January 2005

<sup>463</sup> ECtHR, *Nitecki v. Poland*, Appl. No 65653/01, Decision of 21 March 2002

<sup>464</sup> ECtHR, *Codona v. the United Kingdom*, Appl. No 485/05, Judgment of 7 February 2006

<sup>465</sup> ECtHR, *Marzari v. Italy*, Appl. No 36448/97, Judgment of 4 May 1999; *Zehlanova and Zehnal v. Czech Republic*, Appl. No. 38621/97, Judgment of 14 May 2002; *McIntyre v. the United Kingdom*, EComHR, Decision of 21 October 1998; *Farcas v. Romania*, Appl. No 67020/01, Judgment of 10 November 2005

<sup>466</sup> EcomHR, *Van Volsem v. Belgium*, Appl. no. 14641/89, Decision of 9 May 1990, as in F. Sudre, "La première décision quart-monde de la Commission européenne des droits de l'homme: Une bavure dans une jurisprudence dynamique", *Revue Universelle des Droits de l'Homme*, Vol. 2, 1990, pp.349-353 and in A. Cassesse, "Can the Notion of Inhuman and Degrading Treatment be Applied to socio-economic Conditions?" *European Journal of International Law*, Vol. 2, 1991, pp. 141-145

<sup>467</sup> ECtHR, *Marckx v. Belgium*, Appl. No.6833/74, Judgment of 13 June 1979

overcome analytical obstacles, even in the face of accumulated injustices. We will briefly present some of the main arguments brought forward along these two lines to provide an overview of how the scholarly criticism has taken shape, before integrating these concerns with our own explanation of what exactly is wrong with this framework. We will conclude that even judicial vigour cannot overcome all boundaries, because what is truly needed is a structural revision of the subject.

As regards the first element, there is general agreement that there is high normative significance attached to the deprivation of liberty. Several contributions point out that very often claimants of the first and third category raise substantially very similar complaints and request analogous forms of assistance. Yet mainstream human rights law seems simply unable to even acknowledge a human rights threat when the same suffering is experienced outside of a prison context.

A very compelling account challenging this fixation and illustrating how it generates a chain of analytical shortcomings has been provided by Clements. Drawing from the case-law of the UK Supreme Court, in the example of a prisoner (Napier) and a woman with disabilities (McDonald) he challenges the different levels of human rights care accorded inside and outside the context of loss of liberty. “In both cases, he explains, the applicants were continent and their need was to access a toilet. In *McDonald* she needed help to get to her commode and in *Napier* he objected to using a chamber pot and claimed a right to a private flush toilet. Whereas *Napier's* claim succeeded as a clear violation of Article 3, *McDonald's* claim under art. 8 was rejected as something akin to legal contempt”.<sup>468</sup> Both categories, prisoners and persons with disabilities, he argues, are in the same situation; they are both hidden from the public and dependent on the good services of the State, they both lack the ability to choose where to live and with whom, and they both have little choice about their health and social care arrangements. Napier and McDonald “were both dependent upon the state, one through misdemeanour and the other through age.”<sup>469</sup> Yet while the State is ready to provide a whole spectrum of social arrangements within a prison setting, outside the prison those safeguards evaporate.<sup>470</sup>

In his view, the belief that there is a self-evident objective difference between claiming for a human right from inside the prison context or outside is false and not sustainable by legal analysis. First, the key premise that detention acts as a cliff edge on the one side of which all

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<sup>468</sup> p. 676

<sup>469</sup> Ibid. p. 684

<sup>470</sup> L. Clements, *supra* fn., p. 678

manners of rights get secured, while if one is on the wrong side the safeguards fall, is normatively flawed. Protection, he argues, flows from the general obligation assumed by States to secure human rights and exists even in the absence of a detention.<sup>471</sup> Second, the notion of 'restriction' and 'liberty' is by itself not as straightforward in human rights law and depends more on the intensity of the deprivation, rather than its nature or substance. A person's liberty can thus be restricted also within a foster home or inside the house.<sup>472</sup>

In Clement's view the real reason behind the difficulty in finding a 'deprivation' in cases that are atypical lies mainly in the "half-blindedness" to stereotyping of judges that simply prevents them from looking beyond the detention context;<sup>473</sup> The insistence on this separation he argues leaves the impression that for many judges liberty cannot be experienced in any other manner than an able bodied, utopian construct.<sup>474</sup> It echoes deeper aspects of oppression and discrimination within society and in particular the view public assistance would have to come as a trade-off for wanting to live in a male-engineered society.<sup>475</sup> "In exchange for community living, other human rights must be waived, or if not waived, that these rights (which in the context of detention are deemed to have a strong civil and political rights component) transmogrify into aspirational socio-economic rights." What is ultimately of most concern, he concludes, is the complete inability of judges to acknowledge the distressing circumstances under which marginalised persons struggling to live in society they find themselves.

On the other hand in the view Xenos, who is, in general interested in explaining in technical terms rather than challenging extant jurisprudence, there is a significant qualitative difference between the first two and the third category of positive obligations, linked to causality. Positive obligations that fall within the third category, he argues, represent a new generation of human rights claims which acknowledge that human rights can be threatened for reasons other than a State's liability. This kind of claims do not arise due to an act of interference directly or indirectly attributable to the State, but on account of a person's own circumstances. They reinforce "the constitutional imperative of human rights as free-standing minimum priorities that the society as a whole aims to realise".<sup>476</sup> However, "the critical justification of constitutional human rights, has always been based on the liberal perspective of there being an act of interference, actual or

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<sup>471</sup> Ibid., p. 679

<sup>472</sup> Ibid.

<sup>473</sup> Ibid.

<sup>474</sup> Ibid. p. 680

<sup>475</sup> Ibid.

<sup>476</sup> Xenos, *supra* fn., pp. 142-143

potential, that is causally attributed to the state or non-state actors....” The absence of causation means that a renewed justification of the separation of powers is necessary, as there is a clear fundamental difference between “reacting to an act of interference and intervening directly in the legislator's agenda.” What is opposed, he argues, “is not the protection of the vulnerable as such, but the distribution of the limited resources of states, especially when the financial cost involved is substantial”.<sup>477</sup> As a result, positive obligations in the third category “may only arise when the financial burden on the state will not be great.”<sup>478</sup>

Xenos' effort to explain the Court's jurisprudence has not necessarily met with much support by scholars more critical of the judicial outcomes. For Clements and many other critics, the key to higher protection ultimately lies in the willingness and openness of judges to demonstrate more vigour and flexibility in the face of accumulated injustices in particular.<sup>479</sup>

Related to this first line of criticism is the second strand of criticism of the issue of cost as a limit to the scope of the obligation, an issue that Xenos mentions in the context of defining the obligation. The inconsistent manner in which it is invoked across the different contexts and its catalytic role when failing claims of the third category, often without any further justification has offered fertile ground for extensive debate and criticism. “The same courts that have been so impressive in upholding individual rights in the face of states raising the spectre of terrorism, become utterly limp at the mere mention by the executive of 'resource' constraints, willing to accept such assertions at face value”.<sup>480</sup> A first ground for criticism here concerns the self-contradictory manner in which the issue of cost is deployed. Judges, Clements points out, persistently refuse to engage in any discussion about a State's financial affairs and in any rational analysis about the cost of implementing a right. Yet eventually they do apply economic considerations in their judgment. “The courts cannot have it both ways, on the one hand asserting their inability to get involved in questions that concern the allocation of scarce resources and on the other citing expenditure figures (such as £22,000 in McDonald or the €10,900 in Sentges) as if these figures somehow communicated some self-evident truth”.<sup>481</sup>

A second source of criticism flows from the inconsistencies that emerge once the expenditures

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<sup>477</sup> Ibid., p. 145

<sup>478</sup> Ibid. p. 209

<sup>479</sup> Among the many contributions see E. Palmer, “Beyond Arbitrary Interference: the right to a home?”, *Northern Ireland Law Quarterly*, Vol. 61, No 3, 2010, pp. 225-243; see also “J. Gerds, “Les Droits de l'homme des personnes en situation de pauvreté en Europe: normes, obstacles et perspectives de protection dans les instruments du Conseil de l'Europe”, in *Redefinir et combattre la pauvreté*, CoE publ., 2012, pp. 121-160

<sup>480</sup> Ibid. p. 683

<sup>481</sup> Ibid. p. 683

for each claim are calculated and compared across different contexts, in particular when the same claim is at stake. Clements points out that while McDonald's access to a toilet would have cost £22,000, the refurbishment programme inside the prison would cost millions; yet only the former was considered expensive.<sup>482</sup>

In seeking to disentangle the rationale behind the applicability of the cost and finding a pattern Xenos argues that a possible explanation could be whether the harmful behaviour is foreseen by the law or not. When the behaviour is unlawful and thus unexpected, he argues, limits will be more easily imposed due to the unexpected character of the situation. Likewise the issue of cost is more likely to arise when it is not borne by the State or a private party, but when the individual cannot enjoy human rights on his/her own circumstances.<sup>483</sup>

For most scholars, however, the deployment of costs is guided by political rather than legal concerns. For De Schutter the real reason lies in the apprehensiveness of judges about the financial implications of their judgments and their concern about lacking democratic legitimacy and the necessary expertise to make budgetary choices.<sup>484</sup> Clements points out, however, that polycentric caution as a conceptual justification cannot be indiscriminately deployed or else different values and outcomes regarding the rich and the poor come emerge. "The fear of destabilising the established order is a problematic notion where the status quo is based on the oppression of a disempowered group – be they slaves, women, racial minorities, prisoners or disabled people [...] and it is for this very reason that human rights came to existence."<sup>485</sup> In his view it up to judges to ensure that justice is served, even when rational processes fail.

From the standpoint of this thesis, the legal inconsistencies, the unsettling standards and boundaries and the alleged lack of judicial flexibility that come to the fore once this scheme is turned into practice, are all a direct outcome of the flawed legal subject upon which we have structured positive obligations. In particular, there are two main shortcomings with the specific structure from which most of these inconsistencies flow: first, the equation of autonomy with independence and, second, the failure to acknowledge relationships as an integral component of

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<sup>482</sup> Compare in particular *MSS v Belgium and Greece*, supra fn. and decision in *Sentges v. the Netherlands*, (Appl. No 27677/02, Decision of 8 July 2003). While in the former the Court accepted Netherlands' argument that the yearly cost of the cost of a robotic arm (€10,900) for the estimated 150-400 potential candidates was unsustainable, in the latter it held that crisis stricken Greece was under an obligation to financially sustain the thousands of asylum-seekers residing in the country until their claim had been processed.

<sup>483</sup> Xenos, pp. 208-209

<sup>484</sup> O. de Schutter, "Reasonable accommodation and Positive Obligations", pp. 42-43

<sup>485</sup> Ibid. p. 683; see also Xenos who accepts the lack of democratic legitimacy among judges to make financial choices



the subject's autonomy. Both permeate both meaning and scope of obligations.

Regarding the first element, positive obligations are, as Dröge rightly argues, claims for State assistance that serve to restore or maintain a person's autonomy. Under an individualistic model, autonomy is equated to independence and self-sufficiency. This idea, however, that independence is the *telos* of life, presumes that all human beings are always capable of sustaining a self-sufficient existence and also prescribes obligations accordingly. The State is thus expected to put in place some basic material and institutional arrangements on the attendant assumption that these will make self-reliant living possible; step in when the person's sphere of freedom is under threat by his/her social environment, and otherwise abstain. The problems start when these underlying assumptions of formal sameness and shared ability for self-sufficiency are challenged by human diversity.

For some persons this utopia of independence seems simply not attainable no matter what the State does. One can read behind this a second set of assumptions, namely that the unattainability in itself presumes that the rights-holder naturally enjoys some degree of self-sufficiency and requires only specific forms of assistance to reach that minimum threshold of independence. In the case of the ECtHR in particular, this individualistic structure is particularly evident. The rights-holders in the last category are, in the main, the poor, the disabled, the chronically sick and the homeless. In their case autonomy within the meaning of independence would most likely necessitate either life-long assistance, which by itself would mean dependence would not be possible, or a material investment of such intensity and such an open scope that it would exceed the financial possibilities of the State. As a result and because of these underlying assumptions about human possibilities, they are perceived to naturally fall below that minimum threshold. In other words, their dependence on external assistance is no longer perceived as an institutionalised threat and does not attract State protection because they are simply unable to attain, on account of their own circumstances, what has been made available to everybody else. It is only in highly exceptional cases, which Dröge and Xenos refer to as when the core of the right or dignity is at stake, that State responsibility might be triggered; a threshold of extreme suffering which in practice rarely – if ever – has been met. This partly explains why positive obligations are often not even acknowledged to arise in these contexts.

At the same time the paradox that this equation with independence generates is that persons in the first and second category enjoy remarkably high levels of protection. The reason for this is that they are always viewed as being actively impeded by the State itself or a private threat from

making use of what is otherwise available; in other words, they are assumed to actually be capable of attaining this threshold of independence but to be momentarily restricted by some external agent. Whether they would have actually been able to lead this utopian self-sufficient life in the absence of this threat, in other words whether they are at the same time disabled, poor or sick, is completely absent as a consideration. This is also why State responsibility gets triggered in these cases independent of whether the person is at the same time disabled, sick, poor and so on.

The biggest however paradox lies in how the boundaries of State assistance are designed. In the first two categories, the boundaries are wide since the State is expected to restore the person's presumed autonomy; presumed in the sense of how, in an ideal world, independence would be enjoyed. This is also why we see the State dig deep into its resources and exhaust its capabilities to secure independence, for instance, within the prison context. What it actually does, is seek to 'restore' the detainee's self-sufficiency to the previous hypothetical levels of utopian independence. In the third category, on the other hand, in those rare cases where positive obligations might arise the boundaries are nonetheless very narrow because it is assumed that the State has already exhausted its obligation and has provided all services necessary to ensure autonomy in full; which is why we often find the Court saying that the State offered to the applicant what was made available to everybody else and has, therefore, fulfilled its obligation. To put it simply, the problem with independence is that positive obligations do not actually aim at ensuring autonomy in degrees and domains tailored to a person's needs and situation, but rather at attaining a hypothetical abstract degree of utopian self-sufficiency. When this is not attainable, when the person simply does not match the ideal subject, then the obligation struggles to reach out to the claimant.

The next question that emerges, then, is whether we would be able to enhance protection and address this gap by rendering the obligation, as it stands, more subjective; for instance, by arguing that the minimum threshold of material welfare that makes autonomy possible ought somehow be adjusted to the needs of each person, which is also what many individualistic theorists suggest.

In doing so, we would still run against two obstacles that the current scheme cannot overcome: first, the issue of cost and scarcity of resources and, second, the adequacy of choice criterion. As regards the former, it is simply impossible to make everybody lead an independent existence; both because humans are in reality not like this and they would all consume resources and

because humans are too diverse. We would, therefore, sooner or later inevitably face the challenge of a person requiring an excessive investment in his/her needs at the expense of others, a limit that this scheme offers no way out from.

As regards the choice criterion, rendering autonomy more subjective would necessitate that any independence achieved reflects the person's true choices; this by itself necessitates, as discussed in Chapter I, that the person actually has an adequate range of choices available. Within the current scheme however the only tools to measure whether a person has alternatives is the provision of material goods and services; it is assumed that if goods are in place, a person can choose therefrom. Autonomy is, in other words, measured by the external, objective criteria of material assistance alone. If we would want to render autonomy more subjective, the question of how much material assistance is needed to make autonomy possible would necessitate the input of the recipient himself/herself. The current scheme however does not provide us with alternative channels to measure this. As a result whether positive obligations offer too much or too little will always be open to dispute and numerically measured against the State's resources; and whether a minimum of welfare has been provided as a trade-off for the person's autonomy will always be open to criticism because it is essentially left unregulated.

To overcome these issues and expand our tools, we must first expand our basis of analysis. This necessitates integrating the notion of fostering relationships within our structure, a point which brings us to the second major normative flaw of this structure. Under an individualistic framework, the emphasis is on providing the applicant with the necessary goods and services that will help him/her access a minimum threshold of material well-being. Once this threshold is achieved it is automatically assumed that autonomy has been ensured. While a social environment is present in many individualistic theories, the emphasis is on the threats it poses to the rights-holder. Its fostering role does not, in principle, constitute part of what makes autonomy possible. The ECHR framework is no exception to this. This means that fostering relations, in particular among individuals, are in principle not a part of the legal analysis. This affects the smooth applicability of positive obligations across all three categories, even if those weaknesses often become more apparent in the last category.

In particular, leaving out private fostering relationships means, first of all, that positive obligations only arise when access to the minimum standards of material welfare have been jeopardised; in other words, there is no other reason that can trigger the State's protective duty.

Clement's criticism regarding the Court's half-blindedness and inability to acknowledge or “even affirm rhetorically” the suffering experienced due to exclusion from society and the community, and the very reductionist meaning given to the notion of 'restriction' touches precisely upon this issue. From the standpoint of this thesis, this judicial 'half-blindedness' that Clement invokes flows directly from the exclusion of fostering relationships. The consequence thereof is that the individualistic framework is unable to capture situations in which the loss of autonomy flows from anything else other than material deprivation. While this kind of restriction applies to all three categories, it is in particular in the third one where this conceptual limitation becomes more exposed. To illustrate this, the focus here will be on the judgment in *Farcas v. Romania*,<sup>486</sup> which Clement also invokes in his criticism to show the Court's half-blindedness. In that case, the applicant complained under Article 6 ECHR (right to fair trial) that he had been unable to initiate some civil proceedings against his former employer because the court building was inaccessible to persons with reduced mobility. The Court, however, dismissed the claim on account of the fact that the applicant did have at his disposition alternative ways of reaching the authorities which he did not use; he could have used the postal services and asked one of his relatives to help him. The Court thereby noted:

“the impossibility for a person to bring legal proceedings on account of a lack of special access to courthouses for persons with reduced mobility could be regarded as a hindrance in fact capable of impeding access to a court in the absence of any alternative means to remedy the situation.[...]Mr Farcaş had not submitted any convincing argument to justify his failure to take action by writing to the courts or administrative authorities to challenge the impugned decisions, which he could have done through an intermediary, for example a member of his family.”<sup>487</sup>

Clement points out that what Farcas was really asking for and the Court could unjustifiably not understand was to be able to “live as equal citizen[s], with equal rights to participate in court proceedings”; in other words, if we reframe Clement's argument, to be able to socialise. If we now interpret the Court's reasoning in light of the individualistic scheme then the obligation indeed was fulfilled. In this case, theoretically speaking, the State had laid down the necessary institutional arrangements to secure the right (i.e. the court building) and the applicant did have in fact more than one choice in his disposition to access it; he could have asked one of his

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<sup>486</sup> ECtHR, *Farcas v. Romania*, Appl. No 32596/04, Decision of 30 September 2010

<sup>487</sup> Ibid.

relatives to help him enter the court building or write to the authorities and ask one of his relatives to help him enter the post office, assuming the latter was also inaccessible.<sup>488</sup>

From the perspective of the Court, objectively speaking, the applicant was not in any way barred from accessing the court. Quite on the contrary, the material welfare was within his reach in one way or the other. What the analysis could not capture was the fact that the only way to access the right was by entering into a relationship where the applicant would be dependent on others, in this case his relatives (who in their turn would also have to restrict their own daily activities to assist the applicant), which he considered hurtful to his sense of autonomy. Thus, even if from an external and objective perspective autonomy seemed realised, from the perspective of the applicant the action taken by the State had not empowered him in any way; in fact he was left with no choice other than depend on others to be able to access the right. Yet the kind of coercion *Farcas* experienced could not be articulated within an individualistic framework because access to private fostering relationships does not form part of realising the right and there is no obligation on the State to address these.

A review of the Court's case-law reveals, however, that this kind of reasoning does not seem always applicable. For instance in the case of *D.G. v. Poland*, regarding a disabled prisoner, it was acknowledged (as in many other prison cases) that it is not acceptable for a disabled prisoner to depend on his inmates to access the bathroom.<sup>489</sup> This raises, then, the question of why it was acceptable for *Farcas* to rely on others, in this case his family, to access the court building and not for *D.G.* to rely on his cellmates to move inside the prison? The answer seems to lie less in a conscious acknowledgement of the value of fostering relationships in the enjoyment of the right and more on a drive to protect individuals from obstructive relationships.

In particular, the core logic behind the individualistic model is that if certain material goods are made available and the subject is left alone, he/she is capable of finding an appropriate way out of the presumably various options to gain access to the goods. Once material access has been achieved, autonomy is assumed to be automatically realised and harm has been evaded. In line with this internal logic, the means that the person chooses how to gain access to the goods. Supportive family relationships are generally assumed to be means conducive to autonomy. They thus tend to fall beyond the scope of the obligation unless there is a reason to believe that they act or are likely to act as an obstruction, in which case there is a duty to remove them. The

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<sup>488</sup> Ibid.

<sup>489</sup> ECtHR, *D.G. v. Poland*, Appl. No 45705/07, Judgment of 12 February 2013, par. 150

Court has, for instance, thus far accepted that no issue arises if the person resorts to the help of friends, family or even random people on the street outside a poll station<sup>490</sup> to exercise a right. However, an issue will always arise if one depends on his or her fellow prison inmates. Other than *implying* that they are effective in securing access to the right, the Court has never really explained why all above-described solutions are 'good'. While we may speculate that the moral duty to help family members explains why it is not problematic to rely on their assistance, the same hardly applies to the implicit positive appraisal of having to rely on random pedestrians. On the other hand, the Court's language is unambiguous in declaring that being "in the hands of" a cellmate is something bad. However, it has at times relied on different reasons to explain why relying on cellmates is 'bad'; e.g. that the inmates are not qualified<sup>491</sup> or simply that they are not a viable solution.<sup>492</sup> It has reached the same conclusion independent of whether the inmates were, in practice, helpful and kind towards the applicant or not.

It appears that what really makes the difference between inmates and others is not the quality of the relationship as such, but the choice to enter one at first place. Inside the prison context socialisation is forced, which renders it, by definition, a threat to the presumably independent subject; as a result, the State feels obliged to step in and free as much personal space as possible. On the other hand, in the outside world the person can presumably step in or out of a relationship at will, which is why it is not perceived as an actual or potential interference.

Independent of whether one agrees or not with this, what is nonetheless clear is that in terms of legal analysis the focus is not on who is conducive, as there is an apparent presumption that almost any kind of help will suffice; but on singling out who is clearly obstructive. It is on the basis of these assumptions, that autonomy seemingly only requires two conditions: the availability of goods and the absence of obstructions by others. The rest can be done by the person himself/herself.

If we now look inside the prison context, the subject is confined in a place where the possible

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<sup>490</sup> *Sentges v. the Netherlands*, Appl. No 27677/02, Decision of 8 July 2003; *Farbtuhs v. Latvia*, Appl. No 4672/02, Judgment of 2 December 2004; *Molka v. Poland*, Appl. No 56550/00, Decision of 11 April 2006.

<sup>491</sup> See in particular In the case of *Farbtuhs v. Latvia* where family members and caretakers were available almost round-the-clock to assist the disabled prisoner, a violation was found because of those few hours where the applicant was reliant on cellmates. "An objective differentiation between all others means of assistance is that cellmates are deprived of their freedom. We may speculate that this presumably means they would be more declined to refuse help contrary to the benevolent passengers Molka could have relied on.

<sup>492</sup> *Supra* fn. "Par. 155. The Court has already held that detaining persons suffering from a serious physical disability in conditions inappropriate to their state of health, or leaving such persons in the hands of their cellmates for help with relieving themselves, bathing and getting dressed or undressed, amounted to degrading treatment (see *Price v. the United Kingdom*, no. 33394/96, § 30, ECHR 2001-VII; *Engel v. Hungary*, no. 46857/06, §§ 27-30, 20 May 2010; and *Vincent v. France*, no. 6253/03, §§ 94-103, 24 October 2006).'

routes to access a right are severely circumscribed, both because of the material deprivations and the limited escape possibilities from harmful others. The State thus steps in to both provide material goods and ensure that the few paths to access basic services are not impeded or potentially obstructed by threatening others. Out of all persons that the prisoner will meet in this confined space on his way to accessing the right, the Court has decided that truly threatening are one's cellmates, which is why in the case of *D.G.* a violation is found.

This reading is corroborated by the Court's decision in the analogous case of *Farbtuhs*, who relied on his family, nurses and, some hours per day, on cellmates to cover his needs; it was those few hours of relying on cellmates that led to the violation.<sup>493</sup>

Outside the prison context, however, these same tools, namely availability of goods and absence of interference, do not work that well. They cannot adequately capture situations in which the person, even in the absence of an obstructive relationship and despite having found a way to access to the available services, nonetheless feels oppressed. In the case of *Farcas*, what really bothered the applicant was that he felt socially disempowered because he either had to stay home and exercise his rights in isolation, by post, or by depending on others. None of the means Farcas could have relied on to access the right was actively or even potentially threatening within the Court's meaning. The only way to trigger State responsibility in his case, as the itself Court noted, would be by showing that despite all his/her efforts it was simply impossible to access the right. In other words, Farcas would have to show the complete lack of any technical means to access the judicial authorities and that everybody obstructed him, for instance by refusing to help; an almost impossible threshold. But as long as the means are effective and there is no visible threat, autonomy seems ensured and there is little else that can be done.

The first problem within the individualistic framework is that there is actually no basis to articulate this loss of autonomy when the applicant has gained access to the material welfare, there is no visible threat but the applicant feels nonetheless socially disempowered. The second problem, which is connected to the first, is that by focusing only on the obstructive relationships and only implicitly dealing with the conducive ones, this structure leaves too many questions

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<sup>493</sup> Supra fn. 148, par. 60 la Cour constate tout d'abord que les membres de la famille de celui-ci étaient autorisés à rester avec lui jusqu'à vingt-quatre heures en une seule fois et qu'ils exerçaient régulièrement ce droit ; le requérant ne conteste pas que, pendant ces visites, les membres de sa famille prenaient soin de lui. En dehors des visites, le requérant était surveillé et assisté soit par le personnel de l'infirmerie, soit – en dehors des heures de service – par des codétenus, agissant soit de service, soit à titre bénévole. La Cour doute cependant du caractère adéquat d'une telle solution, laissant l'essentiel de la responsabilité pour un homme à tel point invalide entre les mains de détenus non qualifiés, ne fût-ce que pour un certain temps."The Court itself gave us a reason that inmates are not professionally trained to care for a person.

unanswered.

From the standpoint of this thesis, to address both we ought to first acknowledge and give legal weight to the good quality of the relationship between the subject and his/her social environment because it is in its absence where coercion actually lies. Doing so would not only cover this type of situation, but would also expand the definition of positive obligations and the circumstances under which the State's protective duty is triggered, a possibility which will be explored more in Chapter IV. For now it suffices to note that the obvious inconsistency in the Court's reasoning between the two cases of *Farcas* and *D.G.*, and the apparent arbitrariness do not stem from including relationships in the one case but not in the other or from acknowledging the one person's distress but not the other's. Rather it is a result of relying on tools that simply do not accord legal weight to fostering relationships in either case. As a result, even if judges see the distress and empathise with the applicant it does not mean that they also have the legal language to articulate it, which is where this 'half-blindedness' by and large flows from.

Including fostering relationships within the structure of positive obligations would address the second major criticism of individualistic frameworks, namely the question of cost. As mentioned earlier, under an individualistic structure like the ECHR, autonomy is understood as requiring access to a minimum standard of material welfare which, in its turn, will enable the recipient enjoy an independent and self-sufficient life. In line with this, positive obligations consist mainly of providing the necessary material and financial resources, services and other organisational structures that will make such a life possible. Unsurprisingly, the norm is that if the State cannot afford certain services, in particular when it comes to direct financial assistance and payments, the obligation will be considered legitimately exhausted. A State, as Dröge and many other scholars rightly underscore, can simply not be expected to do the impossible; in this case this would be to pay for something it simply cannot afford.

From the standpoint of this thesis this is precisely the reason why this scheme is also prone to problems of polycentricity, namely when one individual asks the judges to re-organise the State's budgetary priorities and why judges simply raise their hands whenever a State invokes lack of resources, as Clements criticises. If the aim is to provide material welfare and there are not enough resources, in the absence of anything else to refer to the obligation has been discharged. The fact that the issue of costs is mostly raised or rather comes to the fore in third category and not in the first is, as analysed earlier, an outcome of the normative assumption of



independence. The fact, however, that the boundary can simply not be overcome once costs are invoked is the direct outcome of the absence of any other analytical tools and references against which to measure the scope of positive obligations. To put it simply, if the obligation consists of material resources alone and nothing else it is only logical that when there is lack of resources there is not really much else judges can do. Xenos' account, analysed above, captures in this sense quite aptly the rationale of this framework when arguing that practicalities and costs define both the scope and limits of the obligations.

If we introduce and integrate a new dimension instead, in particular fostering relationships as is suggested here, and argue, for instance that scope and limits ought to be defined by one's access to sociability, then we essentially re-design the obligation on a new basis. The wider the basis the more additional channels it provides to evaluate human rights implementation.

The last part of this section relates to the third major line of criticism about how State assistance in many ways reveals an underlying trade-off between human rights and providing care which, in its turn, reflects a deeper social stereotyping towards those who simply struggle to live in society. From the standpoint of this thesis, in terms of legal analysis it is the absence of a fostering relationship towards the State that renders this framework particularly prone to giving out this kind of message.

In particular, as noted earlier, within the individualistic framework, the State as a guarantor is expected to step in and provide the rights-holder the necessary goods that will allow him/her to reach a minimum threshold of material welfare. In the absence of any other parameter, it is assumed that if adequate goods are offered and there is no active interference autonomy will be ensured. We noted earlier that a major legal gap arises when the person achieves the material welfare but he/she nonetheless feels disempowered *vis-a-vis* his/her fellow humans, even in the absence of direct interference. Here we are essentially going to deal with another situation: when the State provides material welfare, but disregards a person's true wishes – independent of whether or not there is a parallel social disempowerment.

A good example to demonstrate what we mean is the judgment in *Matencio v. France*,<sup>494</sup> about the freedom of prisoners to choose their medical treatment. The Court has repeatedly recognised that there is a positive obligation on the State to provide its detainees with access to adequate health care. However in *Matencio v. France* a prisoner with serious health problems refused to be transferred for an indeterminate period of time to a specific prison facility which

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<sup>494</sup> ECtHR, *Matencio v. France*, Appl. No 58749/00, Judgment of 15 January 2004

would have provided him with the necessary medical care on grounds that it was far from where his friends and family lived.<sup>495</sup> He complained about the failure of the State to provide him with the necessary health care in the facility at which he was already staying. The Court found no violation on the grounds that medical treatment had been made available but the applicant had been uncooperative.<sup>496</sup> In this case, what lied at the heart of the applicant's complaint was not the deprivation of adequate health care as such, but rather the deprivation of medical care that took into account his wishes; in this case to stay close to his family and friends. Both kinds of considerations, however, seemed to completely elude the Court's analysis. The focus here will not be on the applicant's relationship to his family and friends, since this fell within the scope of conducive private relationships, which we addressed above. Instead what we are going to focus on is the struggle of the individualistic framework to accommodate choices and at a deeper level one's sense of autonomous agency once the State assumes its protective duty.

In particular, if we follow the logic of the individualistic framework then indeed the obligation was discharged: the State had made available the necessary goods and services and nobody blocked the applicant from accessing them. The only reason access was eventually not achieved was thus neither a result of interference nor the inadequacy of the services, but a result of the claimant's own choice, for which the State could obviously not be held responsible. Hence, no violation was found. What seems most unsettling in this judgment is not the outcome as such, but rather the reasoning that led to the outcome and in particular the Court's obvious inability to understand what the applicant was actually saying; namely that he truly wished to be able stay close to his family. Instead the Court proceeded with examining the case as if this had never been said, simply noting the unwillingness of the applicant to co-operate.

From the standpoint of this thesis what is missing in terms of analysis is essentially a tool to probe the applicant's input in the delivery of the service and a deeper level an acknowledgement that the person stands as an equal partner in his/her relationships *vis-à-vis* the State. The question then would not be whether the applicant co-operated with the State or not, as the

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<sup>495</sup> Ibid. “ 85. La Cour relève encore que, le 1er novembre 2000, le requérant adressa un courrier au chef de l'inspection générale des affaires sociales. Il indiquait n'avoir jamais demandé son transfert dans un autre établissement, mais seulement des soins appropriés à son état de santé. Il arguait également du fait que sa famille et ses amis étaient dans la région de Poissy.[...]88. Elle relève en outre que le requérant ne conteste pas qu'on lui ait proposé au premier trimestre 2000, un transfert vers l'hôpital pénitentiaire de Fresnes aux fins d'une prise en charge médicale complète et adaptée à son état de santé, où il aurait pu bénéficier de séances de kinésithérapie plus fréquentes. (voir §§ 49 et 72 ci-dessus). Le fait que le requérant estime qu'il n'aurait pu y bénéficier des soins nécessaires ne peut être sur ce point regardé que comme une spéculation, le requérant n'ayant pu, à l'époque, connaître la situation précise dans cet établissement pour ce qui est de la dispense des soins.”

<sup>496</sup> Ibid.

Court phrased it; but if the State had offered the possibility to the applicant to take part in the decision-making process of the treatment he was going to receive. The trade-off that many scholars discern in many cases stems from this gap. By leaving this parameter completely aside, namely the quality of the interaction between applicant and State, the individualistic framework creates a situation where the rights-holder's range of choices is effectively limited to either receiving or denying a service. While in some cases the assistance happens to be what the applicant truly wants, in others, like in *Matencio* when neither solution is empowering for the individual, this structure becomes problematic. Instead, by including the quality of the interaction between recipient and State, as we are suggesting, the individual is no longer a passive subject, but has the possibility to voice his/her wants as an active participant.

A review of the Court's case-law shows that in some cases, for instance cases of environmental pollution caused by private industries, this parameter is in fact being taken into account. In particular, in cases where residents have complained about failure to protect from the adverse environmental effects caused by the activities of an enterprise, the Court's standard analysis is not limited to whether the State fulfilled its obligation to secure access to a clean environment. It also encompasses the standing of the affected parties in their relationship towards the State, namely as participants in the making of decisions that obviously concerned their lives:

“The Court points out that in a case involving State decisions affecting environmental issues there are two aspects to the inquiry which it may carry out. Firstly, the Court may assess the substantive merits of the national authorities’ decision to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.”<sup>497</sup>

A different approach to both of those mentioned above is, however, discernible in other cases, for example in those dealing with the State's protective duties in domestic violence cases. Within this context the Court has been asked, for instance, to review the State's behaviour in a case where the victim of the violence dropped her charges against the abuser and stopped co-operating with the State.<sup>498</sup> Here the Court did not follow a reductionist approach, as in *Matencio*, but neither did it scrutinise the interaction between State and victim ensuring her inclusion in the decision-making process. Instead, it declared that the State ought to have taken

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<sup>497</sup> ECtHR, *Taskin and others v. Turkey*, Appl. No 46117/99, Judgment of 10 November 2004, par. 115

<sup>498</sup> ECtHR, *Opuz v. Turkey*, Appl. No 33401/02, Judgment of 9 June 2009, analysed in detail in Chapter V; see also *E and others v. the United Kingdom*, Appl. No 33218/96, Judgment of 26 November 2002

protective action on its own initiative and not have waited for the victim's request.<sup>499</sup> In other words, the State ought to have used its own judgment on what would have been best for the victim and act. More will be said on how this interaction between State and applicant ought to be constructed in the next Chapter. What needs to be retained is the following: first, that in terms of legal analysis, it is in fact inconsistent for the Court to overlook completely the standing of the individual *vis-à-vis* the State in some cases, address it and require specific standards in others, but change those standards completely in other cases. We are thereby left with the impression that whenever the interaction with the State is taken into account this is done less out of a conscious realisation but rather intuitively on the basis of what seems to be just or out of an obvious lack of other means to solve the dispute. Second, it is precisely from this inadequate consideration to the relationship between recipient and State that much of the criticism about stereotyping, trade-off or even paternalism essentially flows from.

Next to this, the problem with the protective duty that the individualistic framework ascribes is that it leaves out of its scope the possibility for the victim to direct the delivery of the services by the State. As a result, at a normative level the line between true assistance that is autonomy-enhancing and interventions that have the opposite effect is blurred. Coercion can, however, also lie in the relationship to a paternalistic State, even in the absence of a threatening interference. At an analytical level, the assumption that if the necessary institutional settings are put into place autonomy will be automatically restored is, therefore, too reductionist to also capture the parallel social mechanisms of support needed – as a matter of obligation – to make autonomy possible. In this sense, it is indeed difficult to tell to what extent the Court, for instance, has indeed let social stereotypes affect its judgments as Clements argues. What we can tell with certainty, however, is that by leaving the relationship to the State unregulated and by applying it inconsistently across the different contexts the individualistic framework does become prone to this kind of criticism.

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<sup>499</sup> Ibid. “168. The Court reiterates its opinion in respect of the complaint under Article 2 of the Convention, namely that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant’s physical integrity (see paragraphs 137-48 above). [...] 171. As regards the Government’s assertion that, in addition to the available remedies under Law no. 4320, the applicant could have sought shelter in one of the guest houses set up to protect women [...] Taking into account the overall amount of violence perpetrated by H.O., the public prosecutor’s office ought to have applied on its own motion the measures contained in Law no. 4320, without expecting a specific request to be made by the applicant for the implementation of that Law.”

## 8. Conclusion

To summarise the arguments made here, the purpose of this Chapter has been to review the concept of positive obligations within human rights law and discuss and analyse their meaning, scope and limits as they emerge within an individualistic framework of rights. Having already established in the previous Chapter that mainstream human rights law is built upon an individualistic perception of the self, the emphasis was on the analytical and conceptual limitations this model generates, and on how they manifest themselves once this model is turned into practice, as in the case of the ECtHR jurisprudence. In particular, after outlining the jurisprudential birth and development of positive obligations within human rights law and the absence of a formal theory, the Chapter engaged with the main challenges and scholarly discussions arising from the extant use of positive obligations in mainstream human rights law as regards the concept as such, the scope and the contours.

Concerning the concept, the Chapter addressed the scholarly debate on the soundness and utility of the notion of positive obligations as such, their juxtaposition to negative obligations, and recent efforts to replace the negative-positive dichotomy with alternative typologies as well as merge all kinds of inappropriate State behaviour within one umbrella term. Two main arguments were made here. First, from a methodological perspective, extant discussions of the notion of positive obligations seek to expand or re-define the concept by relying more often than not on empirically manifested contents and boundaries, which they seek to re-arrange. That way, however, the focus is shifted to the symptoms and not the source which generates them in the first place. Instead, if we apply the lens of the human self we are in a better position to recognise our self-imposed conceptual and analytical limitations and steer our legal systems according to the normative views we wish to see realised. A focus on the human self requires us to take the standpoint of the individual and examine what he/she expects from the State. In terms of substance, the core position defended was that a moderate account of individualistic or relational selfhood, as analysed in Chapter I, is always in a position to distinguish between a request for assistance and a request for abstention.

Moving on with the question of the definition, the Chapter then argued that our extant understanding of positive obligations reflects a doctrinal account grounded in an individualistic conception of the self which views autonomy as self-sufficiency and independence. On this basis, positive obligations are defined as calls for material assistance by the State, which the Chapter argued arise under three circumstances: due to an immediate prior interference by the State,

due to a prior interference by a private party or in the absence of both. It is thereby assumed that once access to material well-being has been achieved, autonomy is automatically ensured. The scope of the obligation is, within this framework, circumscribed by the State's financial possibilities. Using ECHR jurisprudence as a test-case to examine the outcomes of this model in practice, it was established that claims for assistance that fall within the third category enjoy disproportionately less protection compared to the other two categories. That this is an unsatisfactory structure is reflected in the vigorous scholarly critique of inconsistencies and arbitrariness in the interpretation of positive obligations and calls for higher protection for the third category in particular.

Seeking to explain what exactly is wrong with positive obligations that are structured within an individualistic framework the Chapter focused on two main shortcomings: the equation of autonomy with independence and the absence of fostering relationships as an integral component of the obligation. As regards the former, the argument was made that positive obligations seek to attain a minimum abstract level of independence, sometimes even assuming that some capabilities are already naturally present. This structure is challenged by human diversity and human nature, namely the need for socialisation. Positive obligations struggle to reach out to the real person, when the latter does not match the metaphor. Analytically, this generates a scheme where the scope of the obligation seems to extend indefinitely and the limits are necessarily defined by the State's resources and financial possibilities. Once translated into practice, positive obligations fail those applicants who seem naturally unable to attain the *telos* of independence or who appear to demand an investment of resources that goes beyond what has been made available to everybody else; in their majority, claimants of the third category. On the other hand, claimants who enjoy a high threshold of protection are those who are assumed to have been able to reach this utopian autonomy but were actively impeded by external interference; State assistance in these cases is steered towards restoring their autonomy to the previously presumed levels of independent existence. This explains the high levels of protection and intensity of assistance evidenced in the first and second category. The Chapter argued that in the absence of additional analytical and conceptual tools, this schema cannot be fundamentally altered no matter how much we stretch the meaning of our extant tools.

The Chapter then explored the impact of the second major shortcoming, namely the absence of fostering relationships from our extant construction of positive obligations. It explained that

within an individualistic framework autonomy is understood in terms of access to a minimum level of material welfare. Access to fostering relationships is, in general, absent as a consideration. Where the role of the social environment is addressed, the emphasis is placed on removing actively obstructive interactions rather than securing access to facilitative ones. This generates, however, a very narrow basis for analysis because we lack the legal language to articulate and solve situations where the coercion lies in the absence of a conducive relationship, even if material access has been established. Accordingly, this significantly limits the conceptual and analytical tools available to solve legal disputes. Three main arguments were made here. First, positive obligations struggle to deal with situations of social oppression, namely where material welfare has been achieved but in the absence of a private fostering relationship. While this affects all three categories, it is in particular in the third one where the limitations of this model get more exposed. Second, in the absence of any additional tools, the issue of cost necessarily defines the scope and limits of the obligation. Third, by appraising State performance in terms of the access to material welfare but leaving out the quality of the interaction between State and recipient, the extant structure is particularly weak in drawing clear boundaries between fostering and oppressive State assistance.

By drawing from the case-law of the ECtHR the Chapter illustrated the inconsistencies in the Court's approach in this respect. The Chapter concluded that many of the extant shortcomings identified by human rights scholarship, including judicial arbitrariness and half-blindedness even in the face of clear injustices, are in fact an outcome of the very narrow analytical basis generated by the individualistic subject. The individualistic framework of positive obligations struggles to address situations in which it is the absence of social support, rather than material welfare, which stands in the way of an autonomous life.

## **Chapter IV: A Relational Account of Positive Obligations**

In the previous chapters we argued that the mainstream analytical framework towards positive obligations is too narrowly constructed and leaves many legal gaps, as a result of which its outcomes are unsatisfactory in practice, both normatively and analytically. Chapter IV will counter-suggest an analysis of positive obligations based on a relational conception of the self.

To this purpose, the first section will return to the theoretical discussion of the human self. While Chapter I had inquired into the different schools of thought at a more abstract level, here we will take a more hands-on approach. The aim is to carve out the necessary tools and principles that will allow us to transpose a relational understanding of the self into human rights law. As was the case in Chapter I, the reading provided is our own, namely our interpretation of how relational theorists appear to be analysing autonomy against concrete cases and different contexts. By relying mostly on the highly influential work of Nedelsky, we are going to argue that in terms of analysis we distinguish two broad sets of relationships: those of a more interpersonal nature, in the private context, and those of a more institutionalised and public nature, towards administrative bodies and agencies; in other words, a vertical and horizontal dimension. While the idea of a caring and fostering framework applies to all kinds of interactions we can nonetheless discern two evaluative approaches for each set of relationships.

As regards the relationship between citizen and State, we will rely on the application of relational autonomy to administrative law and read an evaluation against three concrete principles: agency, dignity and participation. As regards the second set (of private interactions), from the application of relational autonomy to family law we can derive two principles capable of broader applicability: the possibility of establishing relationships; and the capacity to enter these without being at a disadvantage. We will further support our findings against more abstract accounts, from which we will seek recourse in order to further define the meaning of each principle.

On this basis, we will suggest an analytical framework for positive obligations that captures both the need for fostering sociability with one's fellow human as well the quality standards that should regulate one's interaction with the State. We will argue that positive obligations ought to be understood as calls for assistance to obtain a minimum threshold of material well-being and sociability whenever the individual is unable to attain both; either due to being structurally



dependent on the State, or impeded by a private party or simply due to social disadvantage. As regards their scope, the State must ensure that the individual has the possibility of gaining material access to a right but also of establishing relationships of support without entering into a situation of extreme dependence or severely restricting the autonomy of his/her caregivers. In order to assess whether the obligation has been discharged, the State would have to demonstrate not only the material and social adequacy of the services provided but also that these were provided through a fostering relationship that meets the requirements of agency, participation and dignity for the rights-holder.

The second section will then focus on the applicability of such a relational analysis to human rights law. The latest human rights treaty, the CRPD, which arguably epitomises the shift away from individualistic perceptions of autonomy, offers fertile ground to test the functionality of this framework. To this purpose, we first will pick up where we left off on the discussion of Chapter II, namely the vision of the image of the human subject underpinning the CRPD. We will argue that the rights-holder of the latest thematic treaty features all the main characteristics of a relational conception of the self. After reviewing the manner in which positive obligations are constructed within the treaty itself, we will illustrate, in light of the emerging case-law of the CRPD Committee, the relevance and potential of our suggested framework. The Chapter will conclude by addressing the normative value of the argument that such a relational analysis of positive obligations is not CRPD-specific but ought to be applied throughout human rights law.

## **1. Extracting the basic principles of constructing a relational analytical framework for positive obligations**

For relational theorists, as analysed in more detail in Chapter I, in order to enable our legal-systems to protect true autonomy we ought to embed our rights in a philosophical perception of the self that places the emphasis on emotion, interdependence and relatedness instead of rationality, independence and self-sufficiency. The rights-holder is thereby understood to develop the capacity for autonomy not as a self-reliant and self-oriented individual but in terms of his/her interdependence and connection to others. As regards the optimal social setting, there is general agreement that it is within a caring and fostering social environment that human nature flourishes and thrives. Its scope is thereby broadly defined, practically embracing all kinds

of relationships within society including those towards one's family, friends, neighbours, colleagues and State officials.

When it comes, however, to turning relational theories to practice and solving concrete legal disputes in a manner that reflects these values there is relatively little written, with most accounts remaining at the abstract level. It appears, at least from our reading, that for many scholars relational theory is more about opening new avenues to think about rights and being creative – each one of us in his/her domain of expertise – rather than offering a set of pre-defined, fixed tools, which would presumably have a restraining effect to human thought.<sup>500</sup> Although this flexibility and level of abstraction has arguably contributed to the appeal of relational accounts across various contexts, it has also acted as a major source of criticism, which has focused on their vagueness.<sup>501</sup>

Of particular value in extracting concrete principles of broader applicability are contributions from administrative law and family law, both of which have traditionally preoccupied feminist literature most. In the context of administrative law scholarly attention has focused mainly on welfare rights and the need to ensure autonomy within the interaction between citizen and bureaucratic State. The patronising attitudes by social workers, on the one hand, and the obvious state of dependence of the welfare recipient, on the other, provided fertile ground to push the discussion beyond the classical conception of welfare rights as legal entitlements. The focus shifted on the relationship between client and administration as part of the process to ensure autonomy.<sup>502</sup>

In the context of family law, the need to preserve a woman's autonomy as a partner and mother within a social environment of oppressive expectations became early on the subject of extensive discussions. Much has been written on the complex and sophisticated ways in which emotional bonding can impair or enhance the capacity for autonomy across different contexts of daily life. Most crucially, analysis here goes often beyond the strict scope of the nuclear family and addresses how the wider legal and socio-political context shape intimate interactions and

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<sup>500</sup> See in particular J. Nedelsky, *Law's Relations*, who aspires to render “relational thinking into a habit”, as *supra* fn. , p. 4

<sup>501</sup> See M. Verkerk, 1999, who describes relational accounts as often appearing “hopelessly vague”, p 363. See J. Herring who argues that keeping the discussion at the abstract level has allowed the theory of relational autonomy to gain support from different scholarly perspectives, “Relational Autonomy and Rape” in *Regulating Autonomy: Sex, Reproduction and Family*, (eds) S.D. Sclater, F. Ebtehaj, E. Jackson and M. Richards, Hart publ., 2009, p. 55, p. 61

<sup>502</sup> W.H. Simon, “The Invention and Reinvention of Welfare Rights”, *Maryland Law Review*, Vol. 44, Issue 1, 1985

private relations.<sup>503</sup>

Of particular value in helping us bring all this information together and translate them into workable tools has been the work of Nedelsky, who was also the first scholar to introduce the term relational autonomy into feminist legal theory. Her work, in particular her seminal 1989 Article on “Re-Conceiving Autonomy”, holds a central position within any discussion on relational autonomy. Since part of her account has already been integrated in the theoretical discussion of Chapter we will focus here on the analytical insights she provides us with, in light of which we will re-visit the relational understanding of the self.

#### **a. Nedelsky's application of relational autonomy to administrative law**

In her highly influential 1989 publication on the need to reconceptualise autonomy in a manner consistent with feminist theories of the self, Nedelsky advanced the idea of analysing rights not as property but as relationships. Within the liberal tradition of rights, she explained, the autonomy of the self-made and isolated individual is achieved by erecting walls between himself and the others around him. “The most perfectly autonomous man is the most isolated one.” On this basis, traditional frameworks analyse rights in terms of boundaries. “The idea is that rights are barriers that protect the individual from intrusion by other individuals or by the State. Rights define boundaries that others cannot cross, and it is those boundaries enforced by law that ensure individual autonomy and freedom”.<sup>504</sup> By contrast, if we acknowledge that what gives us power is not isolation but our connection to others, we shift our focus from mainly protecting against others towards structuring those relationships that are conducive to autonomy. Moreover, the human interactions we need to regulate are no longer understood as clashes of conflicting interests but as patterns of relationships that can sustain and develop an enriching life.

In analysing the differences between the two approaches, Nedelsky focused on the interaction between citizen and the State, which she seemed to distinguish from other forms of relationships a person needs to rely on in order to realise autonomy.

“ And some of the relationships which either foster or undermine autonomy are not of an

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<sup>503</sup> See in particular. M. Minow and M.L. Shanley, *supra* fn.

<sup>504</sup> See also her subsequent publication on “Re-conceiving Rights as Relationships”, p. 7

intimate variety, but rather are the more formal structures of authority (which include employment relations as well as the “public” sphere” I deal with here) Ultimately, I think the different approaches (and I plan to pursue both) will complement each other. Here I will focus on how the pathological conception of autonomy as boundaries against others has played itself out on some of the central public institutions of the United States.”<sup>505</sup>

The task, she explained, “is to think of autonomy in terms of the human interactions in which it will develop and flourish”. Our starting point would be to understand the essence of human autonomy and the ultimate objective would be to find the optimal relations that would foster its main components. Our “best guide” to achieve this, was focusing on the “feeling” rather than the capacity of being autonomous.

“The capacity for autonomy can be destroyed by being subjected to the arbitrary and damaging power of others. Power relations are, in that sense, an external 'objective' reality'. [...] But it is also the case that if we lose our feeling of being autonomous, we lose our capacity to be so. To be autonomous, a person must feel a sense of her own power (which does not mean power over others) and that feeling is only possible within a structure of relationships that are conducive to autonomy.”<sup>506</sup>

A focus on this feeling, she explained, determines whose perspective is taken seriously and makes it easier to understand the structure of relationships. While, she argued, it might eventually appear as if we were conducting an objective inquiry by evaluating relationships against a list of components that ought to be fostered, the underlying concern would be the actual experience of autonomy.<sup>507</sup>

In exemplifying her understanding of protecting autonomy in interactions with the State, she relied on a case-study about the right to education for children with disabilities and the way it was delivered across different American institutes. In her example, the schools under examination were required to involve the parents of the children in designing their education programs. In Madison, the school staff truly appreciated parental participation. They engaged the parents early on in the making of the curriculum, treated them as equal partners and considered their judgment and input valuable. By contrast, in Massachusetts the parents were presented with education plans prepared in their absence and “the discussion was often in

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<sup>505</sup> J. Nedelsky, pp. 12-13

<sup>506</sup> Ibid. pp. 24-25

<sup>507</sup> Ibid. p. 25

technical jargon with the subtle implication that the child or the parent or both were at fault”.<sup>508</sup> The case of Madison, Nedelsky explained, provides a good example of an autonomy-fostering relationship. The parents were in this case dependent on the school, but their relationship was nonetheless fostering of autonomy. Autonomy was not based on independence, within the meaning of being able to make choices without being subject to someone else's judgment, but it was autonomy within a relationship; their dependence was transformed. They were not “subordinated objects of bureaucratic decision-making, but were partners in a relationship that fostered their dignity, efficacy, comprehension and competence and that protected them from arbitrary power”. And for some parents, this kind of empowerment made them generally more confident and competent to help make decisions about their child.<sup>509</sup> By contrast, in Massachusetts, the goal was not to reach a decision collectively, but a decision to which the parents would simply not object.

In further disentangling what makes autonomy possible, Nedelsky underscored that participation is central to ensuring autonomy but autonomy is not only about participation. Feeling respected, appreciated and being able to define and pursue one's own goals also form part of the substance of autonomy which we ought to inquire into.

“We must for example ask whether official action in any particular circumstances denies clients basic respect or treats them in ways that makes them less able to understand what is happening to them, less able to participate effectively in the decisions affecting their lives, less able to define and pursue their own goals – in short, in ways that undermine rather than foster their capacity to find and live by their own law. [...] It may be that if such failings are found, increased participation will be a partial remedy. Or the client may need information or support. Or the outlook of the official (e.g. seeing parents as time-consuming sources of trouble rather than as participants valued for their information and judgment) may be the source of the problem.”<sup>510</sup>

The different participatory forms in bureaucratic decision-making sometimes foreseen in contemporary administrative law, she concluded, cannot change the basic power relations that are destructive of autonomy. Where the value of relational autonomy lies is that it makes those decisions accountable to autonomy and gives us insights into how to optimally structure relations even within an imperfect society.

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<sup>508</sup> J. Nedelsky, *Reconceiving Autonomy*, p. 30

<sup>509</sup> J. Nedelsky, *Reconceiving Autonomy*, p. 30

<sup>510</sup> Ibid. p. 34

## **b. Extracting principles regulating the relationship between citizen and State**

Nedelsky's insightful analysis has been highly influential within the discourse about autonomy in several ways. Our focus here will, however, be on the two aspects of her account which offer us guidance on how to disentangle the different relationships and extract analytical principles we can integrate into our understanding of positive obligations; first, her suggestion to analyse rights in terms of relationships and, second, her substantive findings about the optimal relationship between State and citizen.

In particular, Nedelsky's main idea is that to bring our rights systems into alignment with feminist understandings of autonomy as connection to others, we ought to build a social component into our construction of rights and analyse rights in terms of relationships. To this purpose, we ought to first think about the substance and main components of our idea of autonomy and then identify the kind of human interactions that are likely to foster these. Rights should then be interpreted in a manner that best fosters those kinds of relationships.

To demonstrate what kind of possibilities a relational analysis would offer, she then isolates the relationship between citizen and State as a separate category from the other kinds of relationship a person will establish in other spheres of life, for instance in the intimate spheres of life or in more public interactions.

In analysing how this relationship to the State ought to be structured in the optimal manner, Nedelsky does not actually provide us with an exhaustive list of components. She describes, however, the essence of autonomy as a feeling, a sense of inner power,<sup>511</sup> which within this context she further defines as “citizens' feelings over their own competence, control and integrity”. The bureaucratic State, she declares, ought to foster, rather than undermine, these feelings. More indications about their content can be found later in her analysis, when she reviews US case-law on welfare right. In analysing how recent jurisprudential developments on due process requirements ought to be understood she argues that “inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence and power” and that “the components of autonomy to which these legal developments seem responsive are dignity, efficacy, competence and comprehension as well as defence against arbitrariness”.<sup>512</sup>

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<sup>511</sup> p. 25

<sup>512</sup> p. 28;

Nedelsky then turns her theory into practice by reviewing the relationship between citizens and State in the example of the schools. In doing so she appears to rely on three key principles, which if taken into consideration would provide some minimum guarantees that the interaction would foster the parents' autonomy: participation, dignity and agentic competence. In particular, she questions, first, whether the parents participated in the process and their degree of engagement, second, what were the attitudes of the staff, for instance if parents and children were viewed as troublemakers or valued participants, and, third, what was the impact of the interaction on the parents' agentic skills; namely the extent to which they were able to understand what was happening and develop their own judgment (for example due to the language used, and the assistance and the information provided). On this basis, she concludes that the interaction was autonomy-enhancing in the Madison schools.

If we now review the literature on relational autonomy, these three conceptual elements, namely dignity, agency and participation, are actually recurring themes when it comes to disentangling at a more abstract level the fostering or disabling effects of the social environment. We will come back to this discussion immediately below. For the time being, however, we will focus on the function of these three notions as principles regulating the relationship between citizen and State, as Nedelsky appears to suggest.

A reading of other contextualised accounts of relational autonomy does in fact reveal that more often than not these three principles do indeed resurface when analysing the power imbalance in a person's interaction with public agencies. At a more theoretical level, there is often divergence of the kind of 'feeling' each account focuses on. For instance, instead of the sense of power that Nedelsky invokes, other accounts bring together notions of self-trust, self-respect, self-confidence and so on. Leaving the context aside, these variations do not appear, however, to fundamentally alter this analytical structure as they are not mutually exclusive. Instead, all these different concepts seem to represent different angles through which the core idea of self-conception and its correlation to the quality of the relationship can be further explored. Once turned into practice, the analytical considerations that theorists take into account can be explained through the three principles of participation, dignity and agency that we have already identified.

Such examples can be found in the context of health-care. In discussing, for instance, the ethics of forced treatment of patients with addictions through the lens of self-trust, McLeod and Sherwin contend that it "increases the powerlessness of these addicts because all it achieves is a

further reduction in their decision-making power". In their view, in order to be autonomy-enhancing, medical treatment ought to be delivered through trusting relationships between health care providers and patients, which would restore their "confidence in their own abilities" and judgment, improve "their assertiveness skills" so as to encourage their participation in the discussion of their treatment, and heal any sense of unworthiness they might feel. Group sessions, they conclude, represent a step in the right direction.<sup>513</sup>

In the context of domestic violence, several contributions have analysed the ways in which the relationship between the victim and the State fosters or undermines autonomy.<sup>514</sup> In engaging with this discussion, Friedman, amongst others, notes how the relationship with professional caregivers can boost the victim's self-esteem and self-confidence fostering her capacity for autonomy. In carving out the components of what a fostering relationship would entail she underscores, amongst others, the respect owed to victims and the destructive effect of blaming attitudes by social workers, the importance of acknowledging the victim's ability to deliberate and to make choices as well as the long-term value of aiding the victim to reach decisions about her life through ongoing dialogue and support.<sup>515</sup> The argument we make here is thus that it is not controversial to claim that if the principles dignity, agency and participation are applied in our legal analysis to address the power imbalance with the State they would be aligned with a relational understanding of autonomy.

Going back now to Nedelsky's account, what we can also read in her analysis is that relational autonomy requires a holistic kind of support which ensures that the person's participation, dignity and agency are all safeguarded; in other words, the fulfilment of only one will not suffice to safeguard autonomy. This reading finds further support among those contextual accounts that underscore the interconnection between these three notions.<sup>516</sup> In her analysis of the dynamics between paternalistic State policies and autonomy at a more abstract level, Holroyd aptly describes how dignity, participation and agency are "intimately connected" as follows:

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<sup>513</sup> S. Sherwin and C. McLeod, *supra* fn. , pp.229- 231; S. Dodds, "Choice and Control in Feminist Bioethics", pp. 213-235

<sup>514</sup> In a recent contribution Ben-Ishai engages in the debate on the mandatory participation in criminal proceedings of women victims of domestic violence by arguing that both criminal and social services form part to the relationship to the State and their effect ought to be seen together when assessing the impact on fostering or impeding autonomy. E. Ben-Ishai, "The Autonomy-Fostering State: "Co-Ordinated Fragmentation and Domestic Violence Services", *Journal of Political Philosophy*, Vol. 17, Issue 3, 2009, pp.307-331

<sup>515</sup> M. Friedman, "Domestic Violence against Women and Autonomy", in *Autonomy, Gender and Politics*, 2003, pp. 141-160

<sup>516</sup> *Supra* fn.



“it is because an agent is autonomous that she deserves a certain kind of respect; it is because she is autonomous that her actions and choices ought not be interfered with or her choices overridden (other than in exceptional circumstances); and that she is autonomous means that an agent’s decisions and views should be taken seriously in political processes, such as in collective decision making about principles of justice. [...] The normative frameworks of respect, participation, paternalism and autonomous agency are intimately connected. As such, any one claim cannot be easily detached...”<sup>517</sup>

Having thus established that these three notions, namely participation, dignity and agency, offer benchmarks against which the fostering role of the State is appraised when we analyse rights as relationships, it is useful at this stage to elaborate further on the meaning these three concepts have in the academic discourse. To this purpose we will consult accounts that define these notions at a more abstract level before concretising their meaning with examples of 'good' and 'bad' interactions with the State. In the next section, we will also relate the analysis undertaken here to one's relationships within the private context.

#### *(i) agency*

Agency is generally understood as being *de facto* able to deliberate, choose and act in accordance with one's wants and values. The subject, Oshana explains, “may need the advice, even the directives, of others, and her choices and actions may be inspired by a source other than herself. But no one must decide or act for the individual, and the opinions of others must not be the wellspring from which the individual judges her choices and actions to be valid and legitimate.”<sup>518</sup> The actual power and authority to choose and manage one's life must always remain with the rights-holder.<sup>519</sup>

Relational theorists, however, underscore that agency ought to be understood in a unifying manner and encompass not only the outcomes of one's choices and decisions but also the process through which these are made. Autonomy requires not only the making of choices but that these are true to one's inner values; and for this one needs to also develop the agentic skills that allow one to form choices in the first place.<sup>520</sup>

Of particular value in disentangling the different ways in which oppressive socialisation may impede one's ability to act agentially is Stoljer and Mackenzie's analysis, which identifies three

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<sup>517</sup> see also J. Holroyd, “Relational Autonomy and Paternalistic Interventions”, *Res Publica*, Vol. 15, 2009, p. 331

<sup>518</sup> M. Oshana, *Personal Autonomy in Society*, 2006, Ashgate publ., p. 3

<sup>519</sup> M. Oshana, as n

<sup>520</sup> See in particular D.T.Meyers, *Being Yourself: Essays on Identity, Action and Social Life*, Rowman and Littlefield publ., 2004, Chapter 2;

interrelated levels: “the first level is that of the process of formation of an agent's desires, beliefs and emotional attitudes, including beliefs and attitudes about herself [...] the second level is that of the development of the competencies and capacities necessary for autonomy, including capacities for self-reflection, self-direction and self-knowledge [...] the third level is that of an agent's ability to act on autonomous desires or to make autonomous choices.”<sup>521</sup>

For many accounts, a common way to describe the kind of relationships capable of empowering the individual across all those three different layers are relationships of social recognition. In a nutshell, the core argument is that in order to act as an agent one needs to maintain positive attitudes about one's ability to act as such. This self-perception can only be developed and sustained through relationships of recognition.<sup>522</sup> In explaining the power of social recognition Honneth and Anderson underscore that unless one is recognised as a competent agent he/she is also very unlikely to act as one.<sup>523</sup> “If one cannot think of oneself as a competent deliberator and legitimate co-author of decisions, it is hard to see how one can take oneself seriously in one's own practical reasoning about what to do. [...] For these are ways in which individuals are denied the social standing of legitimate co-legislators. They are told, in effect, that they are not competent to shape decisions, and unless they have exceptionally strong inner resources for resisting this message, it will be hard for them to think of themselves as free and equal persons.”<sup>524</sup> Lack or withdrawal of recognition of one's agency, Mackenzie agrees, eventually impairs our autonomy.<sup>525</sup>

Whether such recognition is present is decided not only on the basis of overt restrictions to one's choices but also on the basis of attitudes that *de facto* deny one's agency by seeking to impose someone else's preference or impeding the process of developing one's own. The experience of being dominated, Friedman explains, may, for instance, prompt a person to “abandon wants and values that dominance relationships prevent from realizing. A dominated person may try to convince herself that she never really wanted those things in the first place.”<sup>526</sup> Mimicking someone else's wants and values or acting accordance to someone else's

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<sup>521</sup> C. Mackenzie and N. Stoljar, *Relational Selves*, p. 22

<sup>522</sup> See for eg. P. Benson, “Feeling Crazy: Self-Worth and the Social Character of Responsibility”, pp. 79-85; C. MacLeod and S. Sherwin, “Relational Autonomy: Self-Trust and Health Care for Patients who are Oppressed”, pp. 259-279

<sup>523</sup> See in particular the contributions by J. Anderson and A. Honneth, P. Benson and M. Friedman in J. Christman's book

<sup>524</sup> Ibid. p. 132

<sup>525</sup> C. Mackenzie, “Relational Autonomy, Normative Authority and Perfectionism”, *Journal of Social Philosophy*, Vol.39, Issue 4, 2008, pp. 512-533

<sup>526</sup> M. Friedman, p. 157

wants does not mean that autonomy has been achieved. Likewise, a chronically dominated person may lose the capacity to level criticism against the institutions he/she relies on for protection: “My capacity for critical thinking would be constrained by my need for protection”<sup>527</sup>

Common examples of such negative attitudes include marginalization, isolation, disregard of the person's perspective, control and concealment of information, manipulation, subjection to trauma and chronic abuse, and instilment of doubt, anxiety, fear despair or terror.<sup>528</sup>

Examples of optimal relationships that legitimise the person as an agent include taking seriously one's perspective and judgment, accepting the validity of one's statements, as well as mobilising one's agentic skills by providing information and knowledge, encouraging critical thinking and self-discovery, or communicating in an intelligible manner.<sup>529</sup>

### *(ii) dignity*

While dignity and autonomy are seen as separate values, relational theories agree that there is a certain overlap. Harm to one's dignity can also harm one's autonomy and relations that foster dignity also foster autonomy.<sup>530</sup> In deciphering the interconnection between the two notions, relational theorists attach much weight to semantics, which can impact on one's sense of worth and self-perception at a much deeper level. Next to physical and verbal aggression, a person's sense of worth can also be hurt by denigrating words, condescending attitudes or even by being treated as an object without feelings;<sup>531</sup> these cause not only emotional injury and instant responses of rage, but can also have a long-lasting disorienting or freezing effect<sup>532</sup>

An influential account analysing the linkage between dignity and the sustainability of autonomy has been provided by Anderson and Honneth. Even if a person has been protected from exclusions, they explain, autonomy can still be undermined within a negatively-laden semantic field. “The self-interpretive activity central to autonomous reflection presupposes not only a certain degree of quasi-affective openness, but also certain semantic resources.”<sup>533</sup> Denigrating behaviours and patterns do not only affect one's happiness, but also one's self-perception and

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<sup>527</sup> M. Friedman, p. 162

<sup>528</sup> See in particular the analysis offered by M. Friedman, “Autonomy and Male Dominance”, in *Autonomy and its Challenges to Liberalism*, (eds) J. Christman and J. Anderson, Cambridge University Press, 2005, pp. 150-176;

<sup>529</sup> Ibid.; See also M. Oshana, *Personal Autonomy and Social Oppression: Philosophical Perspectives*, pp. 17-18

<sup>530</sup> J.. Nedelsky, *Law's Relations*, pp. 140-141

<sup>531</sup> See L. Hung and H. Chaudhury, “Exploring Personhood in Dining Experiences of Residents with Dementia in Long-Term Facilities”, *Journal of Ageing Studies*, Vol. 25, Issue 1, 2011, pp. 1-12

<sup>532</sup> S. Brison in the context of Hate Speech, “Relational Autonomy and Freedom of Expression”, in *Relational Selves*, p. 286; J. Anderson and A. Honneth, “Autonomy, Vulnerability, Recognition and Justice”, p. 135

<sup>533</sup> See also J. Nedelsky in *Law's Relations*, p. 65

assertiveness with regard to one's projects. The inevitably evaluative character of semantics impacts on the ways in which we one thinks about one's life. "If, for example, "stay-at-home dad" is taken to be a euphemism for "unemployed" – then it becomes hard to view it as worthwhile." Negative semantics do not only have a demoralising effect by discouraging a person from pursuing wholeheartedly what he/she truly values but also restrict one's options. "Marginalized ways of life, cease to be genuine options for individuals."<sup>534</sup> While it psychologically possible to maintain one's sense of self-worth and self-confidence even in the face of humiliating attitudes, it is much harder to do so and requires personal resilience and effort. And even if a person is successful in doing so, the burden is not fair.<sup>535</sup>

Examples of fostering relationships are those of basic respect and courtesy, awareness and sensitivity towards one's situation, recognition of the other person's inherent value as equal and making the person feel important and worthwhile.<sup>536</sup>

Denigrating attitudes that are destructive to autonomy include demeaning and condescending attitudes, treating the person in an infantile manner, patronising, treating a person as lacking feelings and values and making a person wait for too long.<sup>537</sup>

### *(iii) participation*

Relational theorists define participation in a rather broad manner as active involvement in the shaping of norms that govern one's situation. The emphasis is placed on the importance of giving voice to the person whose fate is being decided: "that is to speak and be heard, to tell one's own life-story, to press one's claims and point of view in one's own voice."<sup>538</sup> Legitimising the subject as an agent is thus not considered enough to realise autonomy, he/she must also have a voice. Participation may include any kind of context of judgment, such as choosing one's health-care treatment, explaining one's personal circumstances before a welfare case-worker, or

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<sup>534</sup> J. Anderson and A. Honneth, "Autonomy, Vulnerability, Recognition and Justice", p. 130

<sup>535</sup> J. Anderson and A. Honneth, "Autonomy, Vulnerability, Recognition and Justice", p. 131; See L. Hung and H. Chaudhury, "Exploring Personhood in Dining Experiences of Residents with Dementia in Long-Term Facilities", *Journal of Ageing Studies*, Vol. 25, Issue 1, 2011, pp. 1-12; J. Nedelsky, *Law's Relations*, pp.140-141

<sup>536</sup> J. Anderson and A. Honneth, "Autonomy, Vulnerability, Recognition and Justice", p. 135

<sup>537</sup> Ibid.; see also W.Simon, "The Invention and Re-invention of Welfare Rights", *Maryland Law Review*, Vol. 44, Issue 1, 1985, p. 17

<sup>538</sup> N. Fraser, "Toward a Discourse Ethic of Solidarity," *Praxis International* 5, 1986, p. 428 ; See also J. Nedelsky, *Law's Relations*, p. 147 ; J. Nedelsky, "Two Faces of Judgment", 2013, p. 18 available at [http://www.law.tau.ac.il/Heb/\\_Uploads/dbsAttachedFiles/TheTwoFacesofJudgment.pdf](http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/TheTwoFacesofJudgment.pdf)

taking part in criminal proceedings,<sup>539</sup> but also participating in the making of society's norms at large — for instance through voting and being heard in policy-making procedures.

In underscoring the importance of participation to the exercise of autonomy, Nedelsky invokes, amongst others, the feeling of being in control over one's life and the empowering effect of openly discussing one's perspective on one's self-interpretation. "The opportunity to be heard by those deciding one's fate, to participate in the decision at least to the point of telling one's side of the story presumably means... that the recipients will experience their relations to the agency in a different way". Inclusion in the decision-making process, Nedelsky argues, declares "their views to be significant, their contribution to be relevant;" it designates the subjects as part of the process, as "members of the community of judgment", rather than as passive, helpless, external objects of judgment.<sup>540</sup> A person who takes part in the making of decisions affecting his/her situation is less likely to relinquish his/her autonomy.<sup>541</sup> In this sense, even if participation is a sham or does not always succeed in profoundly altering the hierarchy within a relationship, its profound contribution to autonomy is not altered.<sup>542</sup>

When it comes to describing the optimal social setting, relational theorists appear to emphasise both the process itself as well as the subject's role in the making of the decision. The power equilibrium between the parties in relation to the means of communication and interpretation as the objective is not merely arrive at a decision the subject will not object to but to arrive at the decision collectively.<sup>543</sup>

Process-wise, optimal relationships are judged by, amongst other factors, the continuity and duration of the relationship, the means of communication, the flexibility of the process and adjustment to the person's needs, the possibility to appeal the outcome, the explanation of the rules in an intelligible manner, the provision of an advocate and the attentive inquiry into the values, needs and self-perceptions of the affected person. Substance-wise, elements of an optimal relationship include placing the subject at the centre of the decision-making process,

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<sup>539</sup> Among the many contributions see S.Sherwin, "A relational approach to health-care", pp. 19-47; C.Ells, M.R. Hunt, J. Chamber-Evans, "Relational autonomy as an essential component of patient-centered care", *International Journal of Feminist Approaches to Bioethics*, Vol. 4, No. 2, Fall 2011, pp. 79-101; E. Ben Ishai, "The Autonomy Fostering State: Co-Ordinated Fragmentation and Domestic Violence Services, *The Journal of Political Philosophy*, Vol. 17, No 3, 2009, pp. 307-331; C.Hanna, "No right to choose: Mandated Victim Participation in Domestic Violence Prosecutions", *Harvard Law Review*, Vol. 109, No 8, June 1996, pp. 1849-1910

<sup>540</sup> J. Nedelsky, *Law's Relations*, pp. 140-141

<sup>541</sup> J. Nedelsky, *Reconceiving Autonomy*, p. 34;

<sup>542</sup> see also J. Nedelsky, "Two Faces of Judgment", 2013, p. 18 available at [http://www.law.tau.ac.il/Heb/\\_Uploads/dbsAttachedFiles/TheTwoFacesofJudgment.pdf](http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/TheTwoFacesofJudgment.pdf) ;

<sup>543</sup> Ibid.; see also N. Fraser, "Toward a Discourse Ethic of Solidarity," *Praxis International* 5, 1986, pp. 425-429

taking decisions and developing plans tailored to the subject's preferences, capabilities and goals, paying attention to the person's values and interests, collaborating with the person to reach the decision and helping the person describe his/her viewpoints.<sup>544</sup>

Critiques of negative examples focus on the ability of the person to understand and follow the process, but also on the lack of attention paid to the social conditions that may impact on the person's role and input in the decision-making process — for instance by overlooking the family's positive or negative influence and wider social structures and stereotypes that may exert undue pressure.<sup>545</sup>

### **c. Extracting principles regulating relationships among citizens**

In the course of Chapter I we analysed the claim that a necessary part of what makes autonomy possible is also the support that a person finds in relationships of a more interpersonal nature, such as to one's family, friends, neighbours, colleagues, peers and even strangers. In order to be conducive to autonomy the general standards of caring and fostering also apply here. Most accounts take a unifying approach when it comes to explaining the effects of socialisation on one's sense of selfhood, embracing all kinds of interactions.

The literature focusing on these kinds of interpersonal relationships is rich but also quite diverse. Most contributions focus on relationships within the family, often understood in a broad manner, and seek to decipher the different ways in which family members impair or enhance each other's autonomy. This is a rather complex task since the depth of the emotional bonding affects autonomy in a much more profound and sophisticated manner compared to more superficial interactions with State officials. The concepts of dignity, participation and agency we analysed earlier are often present but the form they take within this context differs significantly. By way of illustration, in her analysis of romantic relationships among partners Friedman identifies fourteen parameters along which their autonomy-enhancing effect can be assessed. Some of these are decision-making, fairness in the division of labour, the mutual voluntariness of the relationship, care and attentiveness. In further explaining the role of participation in

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<sup>544</sup> Supra fn. ; see also C. Ells, M. Hunt and J. Chamber-Evans, "Relational Autonomy as an essential component of patient-centered care", *International Journal of Feminist Approaches to Bioethics*, Vol. 4, No 2, Fall 2011, pp. 79-101;

<sup>545</sup> Ibid.; see also A. Ho, "Relational Autonomy or undue pressure? Family's role in medical decision-making", *Scandinavian Journal of Caring Science*, Vol. 22, 2008, pp. 128-135; see also

decision-making, Friedman argues that in a fostering relationship, both partners participate in the process and jointly contribute to the final solution. In a disempowering relationship one partner makes decisions faster and with more self-confidence than the other, thus emerging as more reliable and assertive. This asymmetry that affects the other person's sense of identity and, consequently, autonomy.<sup>546</sup>

Finding some homogeneity across the different accounts is quite challenging given the very diverse kind of emotional comfort each relationship nurtures. An even bigger challenge, however, lies in translating considerations such as the above into analytical principles to solve legal disputes. It is hard to imagine how in the language of human rights can ensure certain forms of emotional security in the first place, let alone how to systematise these.

Of most analytical utility for our purposes is the interconnection relational theorists draw between interpersonal relationships and the wider legal and socio-political context within which they are embedded. "While long and committed relationships might presumably exist without the State", Minow and Shanley argue, "there are in fact no family or family-like relationships that are not shaped by social practices and State action".<sup>547</sup> The implication therefrom is that as part of its commitment to ensure autonomy society is in any case expected to protect and promote fostering relationships even of an interpersonal nature.

A very lucid analysis explaining this linkage has been provided by Anderson and Honneth. In their account, "close relations of love and friendship" are understood to nurture one's sense of self-trust which, in turn, is an essential component of autonomy. They argue that self-trust, which means having an open and dialectic relationship to one's feelings, cannot be accomplished alone. It is only when we are close to persons we trust and who support us that we feel confident enough to share and discuss our feelings, desires and inner values, to sustain this dynamic inner life. "And insofar as being comfortable and confident doing this is essential to self-understanding, critical reflection, and thus autonomy, it becomes clear that there is an internal connection between the openness and freedom of one's inner life and the openness and freedom of one's social context."<sup>548</sup> The key result is that a society committed to ensure autonomy ought to address what diminishes one's self trust, whether directly or indirectly. Preventing direct harm in this sense would entail protection from 'intimate violations' like rape. To avert indirect harm society would have to protect the kind of relationships in which self-trust,

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<sup>546</sup> M.Friedman, p. 126

<sup>547</sup> M. Minow and L. Shanley, *supra* fn.

<sup>548</sup> J. Anderson and A. Honneth, p. 135

and hence autonomy, is fostered; “work/family policies (such as parental leave) can be seen as part of a commitment to protecting and promoting one important component of the capacities constitutive to autonomy”.<sup>549</sup> The challenge that remains, is define to what extent the law should have a role in preventing these harms. Legal relations, Anderson and Honneth concede, cannot secure all aspects of human vulnerability.<sup>550</sup>

We can find more guidance on how the law is expected to ensure that individuals can establish fostering relationships with each other in Nedelsky's discussion of relational autonomy in the context of reproductive technology. As long as some basic rules are laid down, her argument goes, the ground becomes more fertile for the development of more caring and attentive relationships that go beyond the scope of the law. “Legal rights, she concedes, foster basic relationships.”<sup>551</sup>

“we cannot expect mothers to be capable of forming optimally loving, attentive, and respectful relationships with their children unless the mothers themselves live within a pattern of relationships that expresses respect for them as individuals and respect and appreciation for their work as parents.”

She underscores, however, that to secure fostering relationships, even within the most intimate spheres of life, we must lay down basic rules applicable throughout society.

“Finally, at the broadest level, we also need to pay attention to the conditions that foster people's capacity to form caring, responsible and intimate relationships with each other- as family members, friends, members of a community, and citizens of a state.”<sup>552</sup>

In a recent contribution, in exploring the applicability of relational autonomy to family law, Herring aptly summarises and further concretises the role of the State in the following manner: “The State is required to create the conditions where a person can exercise their autonomy by entering a relationship which receives support and protection by society; and ensures the individual is not disadvantaged by entering such a relationship.”<sup>553</sup> In explaining what he means

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<sup>549</sup> J. Anderson and Honneth, p. 136

<sup>550</sup> Ibid., p. 139

<sup>551</sup> J. Nedelsky, “Property in Potential Life? A Relational Approach to choosing Legal Relations”, *Canadian Journal of Law and Jurisprudence*, Vol. VI, No2, July 1993, p. 355

<sup>552</sup> Ibid.

<sup>553</sup> J.Herring, “Applying Relational Autonomy to Family Law” in *Relational Autonomy and Family Law*, Springer International publ., 2014, pp. 27-33;



by 'disadvantaged,' he refers to the financial and social disadvantages suffered by those who have invested more in a relationship — mostly women whose caring role is often undervalued, both financially and socially. He uses as an example pre-marriage contracts, which are likely to work to the disadvantage of women in case of sudden accident or loss, by imposing much greater care responsibilities towards a disabled partner or other relative than initially expected.

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While Herring develops his account in a contextualised manner and gives a relatively narrow meaning to the notion of disadvantage, the principle he derives from his reading of relational theories, i.e the possibility of establishing fostering relationships without being disadvantaged, has the potential for a much broader applicability. Of particular value in placing his finding within a wider context is Kittay's work on care and dependence, to which Herring also refers. "While we are all dependent", she argues, "we are not well-positioned to enter a competition for the goods of social cooperation on equal terms".<sup>555</sup> In her view, to ensure equality, society must ensure that those who rely on others are provided with adequate care and services and that those who offer the care are supported so they do not themselves enter into a situation of derivative dependence. In the end, she argues, neither the dependent's nor caregiver's self should be annihilated in the relationship.<sup>556</sup>

Total self-sacrifice, the annihilation of the self in favor of the cared for, is neither demanded by the practice of care nor is it justifiable, for one can see that a relationship requires two selves, not one self in which the other is subsumed and consumed. A care ethic is not a mere reaction to individualism, but it tempers individualism by insisting that the relationships in which we stand help to constitute the individual we have become, are now and will be in the future.<sup>557</sup>

If we now read this discussion as a whole and focus on what kind of principles we can derive from it in order to build the social component of fostering interpersonal relationships into our structure, we can take from it the following: as a basic rule, the State must ensure that when a person exercises autonomy he/she is able to establish relationships without being disadvantaged by this process in the sense of entering into a situation of extreme dependency

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<sup>554</sup> J. Herring, "Relational Autonomy and Family Law", in *Rights, Gender and Family Law*, (eds) J. Wallbank. S. Choudhry and J. Herring, Routledge publ., 2010, p. 270

<sup>555</sup> E. Kittay, *Love's Labor*, supra fn.

<sup>556</sup> E. Kittay, *ibid.* p. 160

<sup>557</sup> E. Kittay, *University of St. Thomas Law Journal*, Vol. 4, Issue 3, p.

and helplessness; and, further, that the person offering care is also not deprived of his/her ability to exercise autonomy on account of the quality and kind of care that he/she needs to be provided.

## **2. A relational analytical framework of positive obligations**

In light of this analysis, it is suggested that applying a framework of positive obligations based on a relational conception of the self would provide us with the following structure:

every human being is entitled to the same human rights and freedoms on an equal basis. Traditionally, positive obligations stem from the State's protective duty to act whenever a person's autonomous existence was under threat, either from the State, a private person or social disadvantage. Depending on the nature of the measures required (legislative, administrative, or judiciary), the State was obliged to provide a facility or service to the rights-holder that would allow him/her access to a minimum threshold of material welfare without interference. The scope of the obligation was, as a rule, circumscribed by the State's financial possibilities.

A relational analysis acknowledges, however, that human rights are not enjoyed in isolation but in connection to one's fellow humans, and that humans are not self-sufficient but rely on the continuous assistance of the State to realise their rights. Individual and State thus no longer stand in a presumed conflict with one another but in a caring relationship where the State as a guarantor assumes the responsibility to ensure the citizens' well-being. Two major consequences follow therefrom. First, our framework acknowledges that humans are unequally situated not only in terms of resources but also in terms of supportive relationships and that the full enjoyment of human rights requires access to a minimum threshold of both. Second, that the State's protective duty as a guarantor comprises not only the delivery of goods and services but also maintaining a relationship with the citizen which reflects the State's caring role.

On this basis, positive obligations ought to be understood as calls for assistance to reach a minimum threshold of material and social welfare that makes the realisation of human rights possible. There are three broadly described circumstances under which positive obligations arise. First, when the individual, due to a prior State action, is structurally dependent on the State and unable to access the necessary minimum standards of material and social welfare. In

such a situation, the State is not seeking to safeguard its role as an aggressor, as some individualistic accounts argue, but acknowledges that the individual stands in a basic relationship with the State and is structurally unable to access minimal material welfare by his/her own means or maintain his/her own net of support. The State as a caretaker steps in to ensure that the individual has access to both. Typical examples of this category are cases of lawful deprivation of liberty and any other contexts in which the person is under the direct control and responsibility of the State (e.g. military camps in the context of military service).

Second, positive obligations can also arise when the person's access to a minimum access to material and social welfare is impaired due to a prior interference by a private party. The State here acknowledges that not all relationships in which the individual participates are fostering but rather some are actively harmful, and the State steps in to protect the individual from the direct threats they pose. In doing so, it seeks to aid the restoration or establishment of his/her ability to exercise autonomy. Typical cases in this category are situations of violence and assault, but also interferences caused by the activities of private enterprises.

The third category comprises those situations where even in the absence of a prior State action or private interference a person is nonetheless unable to access a minimum threshold of material and/or social welfare by his/her own means. In these situations the State acknowledges that the individual is at a social disadvantage and steps in in order to assist the person to maintain or restore his/her autonomy. Typical cases in this last category are claims for public assistance in the context of severe disabilities, poverty, homelessness or in the aftermath of natural disasters.

As regards the scope of the obligation, within an individualistic framework it is acknowledged that positive obligations can only go so far as ensuring the individual's autonomy within the bounds of the State's financial capacity. This means that they must, as a minimum, provide the individual with escape routes from harm; harm is thereby considered to have been averted if the rights-holder has the possibility of gaining access to the right, a finding that is made on the basis of material criteria. A relational framework expands this framework by integrating a social component. While the State cannot ensure *in abstracto* that everybody has a happy social life, the State must not only ensure the possibility of accessing certain material services but also that, in doing so, the individual has the possibility to establish supporting relationships without entering into a situation of extreme dependence and/or compromising the caretaker's autonomy.

Finally, as regards the fulfilment of the obligation — in other words the kind of action a State is expected to take to assist the individual realise the right — an individualistic framework foresees mainly interventions of a material nature, namely legislative, administrative and judicial measures, on the basis of its own judgment of the situation. A relational approach acknowledges that the delivery of goods and services reflects an overly reductionist view of the State's protective role. Instead, it holds that whenever the State assumes its protective duty it enters into a relationship with the recipient. In addition to goods and services, it must also ensure these goods are provided through relationships that empower the individual. As minimum safeguards the relationship ought to protect the individual's sense of dignity, agency and participation.

Seen as such, the whole structure of the obligation acquires a parallel social dimension. For every material criterion that the individualistic framework relies on to define meaning, scope and contours, the relational framework adds a relational consideration. Positive obligations arise not only when the person is unable to access the necessary material welfare but also when his/her social welfare is at stake. The scope of the obligation is defined not only in terms of access to some minimum material standards but also some minimum standards of sociability. In assessing State behaviour it does not suffice to appraise the material and social adequacy of the goods and services provided, but also the relationship between individual and State through which these were provided. Unless all components have been fulfilled, the obligation will not have been discharged.

As is always the case in law, the complexity of human nature means that there may be grey areas once theory is turned into practice. In the rest of the thesis we will engage in testing and appraising the above-described scheme against different contexts and in light of different human rights frameworks. It is submitted, however, that this kind of an analysis supersedes our extant basis for analysis in many ways: first, as already established in Chapter III and as we will analyse further in Chapter V, it brings to the fore and systematises a line of thinking that is already implicit within extant legal thinking about human rights; second, it is capable of addressing situations and conceptualising complaints that elude our current mainstream framework; and, third, it unifies human rights law by offering a more expanded and comprehensive umbrella framework capable of embracing both mainstream and thematic human rights treaties. Its potential in actually enhancing human rights protection compared to our extant approach will be elaborated on in Chapter V.

As a first next step, to illustrate both the applicability and the added value of our suggested

analytical framework within human rights law the next section will explore its relevance and consistency in light of a human rights treaty that is arguably grounded in a highly relational perception of the self, the CRPD.

### 3. The Convention on the Rights of Persons with Disabilities

To better understand the image of the human being that the CRPD projects — an image which we are going to argue is that of an intersubjective rights-holder — one needs to take into consideration the historically innovative circumstances under which this image was drawn.<sup>558</sup> The most important aspect of this process was the direct input of persons with disabilities and NGO representatives in the drafting of the treaty.

The idea of preparing an international human rights treaty that would focus on persons with disabilities was formally placed on the UN negotiating table in December 2001.<sup>559</sup> In Resolution 56/168, which was adopted without a vote, the UN General Assembly decided to establish an *ad hoc* committee that would “consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities.” The Committee assumed its tasks soon after and the drafting process started. Political circumstances were rather ripe. Decades of awareness-raising campaigning, a series of UN initiatives accentuating the disability dimension of human rights and a growing interest among policy makers in integrating disability issues in their national agendas had laid fertile ground for the idea of a formally binding treaty.<sup>560</sup> The drafting process was completed within eight sessions between 2002 and 2006, making the CRPD the fastest negotiated treaty in the history of human

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<sup>558</sup> See G. de Burca, *The EU in the Negotiation of the UN Disability Convention*,

<sup>559</sup> An earlier initiative suggesting the adoption of a thematic convention on disabilities was eventually withdrawn, “when the sponsoring delegation sensed that it would not succeed without a vote, which would have been counter-productive”, see Quinn who cites the draft version of Resolution 2000/51 in “The current use and future potential of United Nations human rights instruments in the context of disability”, p. 42

<sup>560</sup> Previous efforts had resulted in the adoption of soft-law documents. Compare in particular UN Standard Rules on the Equalization of Opportunities for Disabled Persons, adopted by General Assembly resolution 48/96 of 20 December 1993 with the early Declaration on the Rights of Mentally Retarded Persons, adopted by the General Assembly in 1971. On the evolution of disability rights at the UN level see in particular “The current use and future potential of United Nations human rights instruments in the context of disability”, G. Quinn and T. Degener, with A. Bruce, C. Burje, J. Castelino, P. Kenna, U. Kilkelly and S. Quinlivan, United Nations publ., 2002. See also C. Barnes, “A Legacy of Oppression: a History of Disability in Western Culture”, in ‘Disability Studies: Past Present and Future’, (eds) by L. Barton and M. Oliver, The Disability Press, 1997, pp. 3 – 24; K. Guernsey, M. Nicoli and A. Ninio, “Convention on the Rights of Persons with Disabilities: its Implementation and Relevance for the World Bank”, Discussion Paper No 0712, June 2007

rights law.<sup>561</sup> Following its adoption on 13 December 2006, it took only two further years for the CRPD and an Optional Protocol establishing a complaints procedure to enter into force.

However, the most path-breaking aspect of the preparation of the CRPD was the unprecedented level of civil society engagement in the negotiation process. Recognising early on that the official UN delegates lacked the necessary expertise in disability issues, the Committee decided at its first session that accredited NGO representatives would participate in the drafting process and be allowed to attend all public meetings — which was then extended to include the informal consultations — as well as make written and other statements.<sup>562</sup> The decision was warmly welcomed by NGOs. Under the motto “nothing about us without us” that had been used widely at the activist level for years, NGOs had an extensive formal and effective representation throughout the negotiation proceedings and actively engaged in all aspects of the preparation of the new treaty.<sup>563</sup> Citing from his own experience as an NGO representative, Trömel describes the impact that the participation of persons with disabilities had during the drafting. During the first crucial meeting of the Ad Hoc Committee, organisations of persons with disabilities were actively present and provided testimonies of how they experienced wide-ranging human rights violations worldwide and of how little the UN human rights machinery took consideration of their situation. Their presence, he argues, proved crucial in establishing the need for a Convention.<sup>564</sup> Similarly, the subsequent decision to allow the active participation of NGO representatives with the same rights as Government delegates throughout the negotiation process proved instrumental in the preparation of the Convention. It meant, according to Ambassador McKey who is quoted by Trömel, that 70% of the text of treaty would be attributable to the contribution of persons with disabilities.<sup>565</sup>

At the scholarly level the meaningful involvement of persons with disabilities in the preparation of the CRPD has been praised for adding a unique interpretative weight to the text of the treaty<sup>566</sup> and for being directly connected to many innovations compared to previous human

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<sup>561</sup> See UN enable website, <http://www.un.org/disabilities/default.asp?id=150>

<sup>562</sup> For a discussion of the negotiation process on the basis of her own experience see, in particular, T. Melish, “The UN Disability Convention: Historic Process, Strong Prospects and why the UN should Ratify”, Human Rights Brief, March 2007, pp. 4-5; For the decision authorising NGOs to take part in the drafting process see Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, A/57/357, par. 10

<sup>563</sup> Ibid.

<sup>564</sup> S. Tromel, “A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities”, *European Yearbook of Disability Law*, Vol. 1, Oct. 2009, p. 115

<sup>565</sup> S. Ibid.

<sup>566</sup> Don MacKay, The United Nations Convention on the Rights of Persons with Disabilities 34(2) *Syracuse Journal of International Law & Com.* pp 323, 324 (2007) ; A. Dhanda, Legal Capacity in the Disability Rights

rights treaties.<sup>567</sup> At a deeper level, Quinn explains, their physical presence brought with it a frank acknowledgement of the reality of the human condition and dispelled many of the 'myths' on which our human rights doctrine is based. Most crucially it meant that the story of the 'masterless man' could no longer be sustained.<sup>568</sup>

#### 4. The fundamentally interdependent person of the CRPD

The image of the human being that the CRPD person gives rise to is best described as a fundamentally interdependent person because it is a person who is in constant interaction with a social environment that needs and invests in this relationship as much as it invests in itself.

From a physiological perspective, the CRPD projects a conception of human nature that is embodied but also very diverse and fluid. The CRPD person is not tied to any specific types of impairment or other biological characteristics. It is a person, the text tells us, who could be young or old, male or female,<sup>569</sup> who could have some type of a long-term impairment or not,<sup>570</sup> who may be blind, deaf, both or none of the above.<sup>571</sup> Far from being abstract and faceless, we see a very lifelike and embodied person that experiences human rights in different everyday situations, such as school, work, home, in a theatre or simply on a bus; thus a highly pragmatic approach, attributable to the nature of the drafting process described above, as it has been tailored according to real-life experiences. Yet while the rights-holder is clearly an embodied and mortal person it is at the same time fluid and inclusive; the CRPD underlines that this person is not and does not want to be defined by his/her bodily characteristics but should be viewed as part of human diversity.<sup>572</sup>

The wishes and preferences of the person hold a central position in the Convention. Their centrality reflects the major concern among the drafters and, in particular, the NGO

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Convention: Stranglehold of the Past or Lodestar for the Future?, 34(2) *Syracuse J. Int'l L. & Com.* 429, 430 (2007).

<sup>567</sup> G. Quinn, "Rethinking Personhood: New Directions in Legal Capacity, Law and Policy", 29 April 2011, Paper available at <http://www.nuigalway.ie/cdlp/documents/events/Vancouver%20GQfinal.pdf>; see also G. Quinn and A. Arstein-Kerslake, "Restoring the Human in Human Rights, The Cambridge Companion to Human Rights Law", CUP, 2012, pp. 36- 54

<sup>568</sup> Ibid.

<sup>569</sup> See for example CRPD, Articles 6, 7 and 25

<sup>570</sup> CRPD, Article 1: "Persons with disabilities *include* those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". [emphasis added]

<sup>571</sup> CRPD, Articles 24,

<sup>572</sup> CRPD, Article 1

representatives to eliminate paternalistic and coercive behaviours and recognise persons with disabilities as agents and not 'objects'.<sup>573</sup> Individuality, autonomy and freedom of choice are recurring themes in the Convention.<sup>574</sup> The CRPD person emerges therefrom as a human who is unique in his/her diversity; a person of his/her own, with his/her own “physical and mental abilities,”<sup>575</sup> who is endowed with “talents and creativity”<sup>576</sup> and contributes to society in his/her own unique way on the basis of his/her own “skills, merits and abilities”.<sup>577</sup> This person is not monolithic but outgoing and involved, with a wide range of interests and seeks a life of diversity. The CRPD person wants for instance to be out of the house, to make use of the Internet,<sup>578</sup> have access to communications and new technology,<sup>579</sup> and take part in sports and activities in recreational venues. At the same time the CRPD underscores that it is a person with a distinct personality, who has his/her own “will and preferences”<sup>580</sup> and wants to lead a life according to his/her own feelings, values and choices.<sup>581</sup> The CRPD person wants to have the freedom to choose where to live and with whom,<sup>582</sup> wishes to be in control of his/her affairs<sup>583</sup> and to be actively involved in decision-making processes, in particular those concerning him/her.<sup>584</sup> To achieve all this, however, the CRPD underscores, this person depends on social support. The text of the CRPD goes into great detail in describing the necessary institutional and material arrangements across the various spheres of both public and private life, such as buildings, roads, transportation and medical facilities,<sup>585</sup> social protection programmes, such as public housing, financial assistance and retirement benefits,<sup>586</sup> and also in-home and residential support services,<sup>587</sup> mobility aids, assistive technology, intermediaries and personal assistance<sup>588</sup>.

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<sup>573</sup> See <http://www.un.org/disabilities/default.asp?id=150> ; See also Compilation of Proposals for Elements of a Convention, Part II, Statement of Objectives, 5 January 2004 and in particular the submissions by the World Network of Users and Survivors of Psychiatry to the ad hoc Committee, of 30-31 December 2003 & 5 January 2004 and of 15 January 2004; See also Daily Summary of Discussions of Fourth Session of the ad hoc Committee related to Article 9

<sup>574</sup> CRPD, Article 3(a)

<sup>575</sup> CRPD, Article 24

<sup>576</sup> Ibid.

<sup>577</sup> CRPD, Article 8

<sup>578</sup> CRPD, Article 9

<sup>579</sup> CRPD, Article 20

<sup>580</sup> CRPD, Article 12

<sup>581</sup> See submissions by the World Network of Users and Survivors of Psychiatry to the ad hoc Committee, of 30-31 December 2003 & 5 January 2004

<sup>582</sup> CRPD, Article 19

<sup>583</sup> CRPD, Article 12

<sup>584</sup> CRPD, Preamble (o)

<sup>585</sup> CRPD, Article 9

<sup>586</sup> CRPD Articles 9 and 28

<sup>587</sup> CRPD, Article 19

<sup>588</sup> CRPD, Articles, 19 and 20



The CRPD further emphasises that this person does not live in isolation. It is a person who lives in a society and interacts on a daily basis with other humans across all spheres of life, in the family,<sup>589</sup> at school<sup>590</sup> and at work.<sup>591</sup> It is a fundamentally social being, who values life in the community he/she belongs to and connects with others, who wants to participate in every aspect of the life of the community,<sup>592</sup> is interested in common affairs, wants to be included in public and political life,<sup>593</sup> and who suffers when forced into segregation.<sup>594</sup> The ties the CRPD person forms with his/her fellow humans are an integral element of his/her identity and self-perception. Far from being self-absorbed and inward-looking it is a person who needs to feel accepted by his/her fellow humans;<sup>595</sup> who is susceptible to “negative attitudes”<sup>596</sup> and “undue influence”,<sup>597</sup> who can only realise his/her rights across all spheres of life in an environment of “receptiveness”, “positive perceptions”, “respect”, “recognition of skills, merits and abilities”,<sup>598</sup> and “encouragement”.<sup>599</sup> At the same time, the CRPD makes it clear that these are not relations of charity; it is a person who is equal to his/her fellow humans, whose contributions are essential and valuable to the overall well-being of the community and who merely seeks acceptance of his/her worth and respect in a society of diversity.<sup>600</sup>

If we compare the most basic characteristics of this human subject against the two theories of the self presented in Chapter I, then it is hard to dispute that the CRPD reflects a relational conception of the self. This is the case, first, because of the emphasis placed on emotions in one's capacity for autonomy. In particular, competence for autonomy is not defined in terms of one's cognitive skills. Self-determination is perceived instead as a more complex process of self-reflection involving feelings and one's own sense of personhood. Recurring themes within the text of the treaty, such as susceptibility to negative attitudes, need for encouragement, appreciation and acceptance, bring to the fore the emotional side of the human subject and the impact of positive and negative affective states in one's self-conception. In addition to this, while the CRPD talks about individuality, it also makes it clear that needfulness and reliance on

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<sup>589</sup> CRPD, Article 23

<sup>590</sup> CRPD, Article 24

<sup>591</sup> CRPD, Article 27

<sup>592</sup> CRPD, Article 24, Article 30

<sup>593</sup> CRPD, Article 29

<sup>594</sup> CRPD, Article 19

<sup>595</sup> CRPD, Article 3 (d)

<sup>596</sup> CRPD, Preamble (m) and Article 1

<sup>597</sup> CRPD, Article 12

<sup>598</sup> CRPD, Article 8

<sup>599</sup> CRPD, Article 30

<sup>600</sup> CRPD, Article 3

material support in all spheres of life are fundamental aspects of this image. The CRPD person is presumed to be dependent on external support, and not the contrary; any association of autonomy with self-sufficiency is absent. In fact, as a participant NGO aptly phrased it during the drafting process, “persons with disabilities have the right to make decisions based on their own feelings and values, and to not have their decisions interfered with by others. This is what is meant by a right to autonomy and self-determination”.<sup>601</sup> Third, relations form a constitutive element of this image. The CRPD tells us that a person's “sense of self-worth”, in other words a person's identity and perception of the self, are forged through relationships; the social environment is not something a person can choose to step in and out of, but always there. And it is not seen as a primary threat, as individualistic accounts tend to emphasise, but as fostering relations of “encouragement”, “respect”, and “acceptance”. Starting at the “family level” and extending “throughout society” such relationships are a necessary support to realise autonomy and lead a life of choice. Seen altogether, there is, in fact, nothing individualistic about this image.

## **5. The 'social model' of disability**

A potential question that is best addressed here before moving on with the discussion of positive obligation is how our finding about the relational conception of the self underpinning the CRPD relates to the 'social model' of disability, used widely within human rights doctrine to describe the CRPD's rights-holder. This merits closer examination both to dispel any confusion and because it relates to another strand of discussion which will be dealt with at the end of this Chapter, namely the normative relevance of the CRPD person to the mainstream human rights subject. In this first section we will first briefly explain the social model and then link it to the relational conception of the self.

The idea of the “social model” of disability dates back to a 1975 publication by a disability rights group that drew a distinction between 'impairment' as a physical condition and 'disability' as a form of societal segregation.

“In our view, it is society which disables physically impaired people. Disability is something

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<sup>601</sup> See also Submissions by the World Network of Users and Survivors of Psychiatry to the ad hoc Committee, of 30-31 December 2003 & 5 January 2004

imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society.”<sup>602</sup>

Building up on this distinction, a few years later sociologist Oliver introduced the term 'social model' of disability, contrasted to the 'medical' or 'individual' model, to capture this alternative understanding of disability.<sup>603</sup> The core idea was to advance a new understanding of disability, as a social creation and an externally imposed restriction rather than a 'personal tragedy' nobody was responsible for.<sup>604</sup> While the model has been of immense and varied significance within the disability rights movement, the focus here will be on a few critical aspects in its development of a conceptualisation of a disabled person that are directly relevant to the present discussion.

Oliver himself had advanced the position that the social model “is nothing more complicated than a focus on the economic, environmental and cultural barriers encountered by people who are viewed by others as having some form of impairment – whether physical, sensory or intellectual.”<sup>605</sup> At a scholarly level, his model received three major lines of ontological criticism by disability theorists. First, that it over-simplified the oppression a disabled person experienced from society and risked denying the actual existence of impairment as a physical condition. Embodiment, however, is both present and is central to the disability experience, as different impairments have different social and individual implications. Denying or overlooking the body and the existence of impairment in its plurality could have unfortunate consequences, even by the mere fact that each case needs different forms of intervention.<sup>606</sup> Second, it was claimed that Oliver did not give enough consideration to the personal experience of disability. By separating disability from impairment and focusing on the external barriers alone, the social

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<sup>602</sup> Union of the Physically Impaired against Segregation, *Fundamental Principles of Disability*, 1975

<sup>603</sup> M. Oliver, *Social Work with Disabled People*, Macmillan publ, 1983; For more see J. Bickenbach, S. Chatterji, E. Badley and T. B. Üstün, "Models of Disablement, universalism and the international classification of impairments, disabilities and handicaps", *Social Science and Medicine*, 48 (1999), pp 1173- 1176; M. Oliver, "The social model in action: if I had a hammer", as in *Implementing the Social Model of Disability: Theory and Research*, ed. by C. Barnes and G. Mercer (2004), The Disability Press, pp18-31; S. Brisenden, "Independent Living and the Medical Model of Disability", *Disability, Handicap and Society*, vol 1, nr 2, 1986, pp 173- 178; H. Bielefeldt, "New Inspiration for the Human Rights Debate: The Convention on the Rights of Persons with Disabilities", *Netherlands Quarterly of Human Rights*, Vol. 25/3, 397-399, 2007; ; M. Oliver, "Social Policy and Disability: some theoretical issues", *Disability, Handicap and Society*, vol 1, nr 1, 1986, pp. 5-16

<sup>604</sup> M. Oliver, "The social model in action: if I had a hammer", as in *Implementing the Social Model of Disability: Theory and Research*, ed. by C. Barnes and G. Mercer (2004), The Disability Press, pp18-31; for a more critical discussion see T. Shakespeare, "The Social Model of Disability", pp. 214-221, *The Disability Studies Reader*, (ed) L.J. Davis, Routledge publ., 2013

<sup>605</sup> Ibid.

<sup>606</sup> T. Shakespeare, "The social model of disability: an outdated ideology?", *Research in Social Science and Disability* Vol. 2, 2002, pp. 9-28

model appeared to present disability as if it were only about accessing a physically inaccessible environment and denied any notions of emotional pain. Connected to this was the third strand of criticism which focused on the weakness of the model in capturing different social divisions of disability, such as gender, age or sexuality.<sup>607</sup> The way an elderly woman, a child or a man experiences disability, and the impact that the bodily impairment has on one's self-perception, critics argued, matters and is varied. as well as the objective reality of disability, there was also a subjective reality.<sup>608</sup> Oliver himself had counter-argued to this that the main idea behind the social model was not to deny impairment, but lift it from its individual-pathology framework — not to capture “the personal experience of impairment but the collective experience of disablement” — and that, in any case, his account was capable of integrating the different dimensions of disability.<sup>609</sup>

Within this wider discussion among sociologists about the conceptual limitations of the social model in capturing disability, a contribution of note was the 1999 articulation of the 'social-relational' model by Thomas. Oliver's social model, she explained, had given the key to unlock the ontology of disability by lifting disability from the traditional biomedical field and placing it onto social terrain.<sup>610</sup> He thereby embedded disability in a nexus of social relations. The next step, she argued, was to identify the social relationships that exclude persons with disabilities and include the non-impaired, and understand what generates and sustains those relations. In her view, scholars had so far successfully identified the 'social barriers' in areas related to civil status and material well-being and had highlighted key factors of social exclusion. Less attention had been given, however, to the ways that these disabling social relations affected intimate areas of life, such as parenting and reproduction. Our overall understanding of disability as a socio-relational phenomenon was generally underdeveloped and the impacts and effects of social behaviours needed to be further theorised. One crucial aspect of this, she argued, was the 'psycho-emotional' dimension of disability. This comprised the exclusions that work along psychological and emotional pathways, when one feels disabled both from the inside, by feeling of lesser value or unattractive, as well as from the outside, for instance when being rejected in a

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<sup>607</sup> Ibid.

<sup>608</sup> J. Morris, “Feminism, gender and disability”, Text of a Paper presented at a seminar in Sydney, February 2008, available at <http://disability-studies.leeds.ac.uk/files/library/morris-gender-and-disability.pdf>

<sup>609</sup> Ibid.

<sup>610</sup> C. Barnes, “Developing the Social Relational in the Social Model of Disability: a theoretical agenda”, Chapter 3 in *Implementing the Social Model of Disability: Theory and Research* (eds) by C. Barnes and G. Mercer, 2004, pp. 32-47

specific context because of the impairment.<sup>611</sup>

“..for example in familial relationships, in interactions in communities, and in encounters with health, welfare and educational services. Who has the power, and how is it wielded? What are the decisions made, the words said, the meanings conveyed, in these networks of relationships? And what are the effects on disabled individuals’ sense of self, self- esteem, and existential security? “

Understanding disability in this socio-relational way, which she attributed to her interest in feminist studies, was crucial because it “ shapes in profound ways what people can *be*, as well as affecting what they can *do* as a consequence. “<sup>612</sup>

While the sociological discussion on the social model goes much further than that the outline given here, there are several things that need to be retained from this brief overview. First, there is no single 'social model' upon which the CRPD is based. While the core idea remains the same, namely disability as a social structure, its content has evolved significantly since 1975. In fact, the argument made here, which is also the first interim conclusion of this section, is that in many respects the CRPD has followed this development and has addressed some of the main ontological concerns that have, over time, been put forward. Evidence of this may be found throughout the text, but the focus here will be on the Preamble, with the understanding that it frames the object and purpose of the disability discussion in the CRPD.

In particular, in line with this core idea, the CRPD sets out by acknowledging that disability is an “evolving concept...that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.” Evocative of the biggest criticism of Oliver's original idea, namely the question of pluralism and diversity, the same Preamble further recognises “the diversity of persons with disabilities” , the “difficult conditions faced by persons with disabilities ... on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status” and the need for a “gender perspective” in all policies. In this sense, disability is not treated only as one shared experience, but also a subjective reality. This acknowledgement holds the key to unlock a more comprehensive policy approach, as the social model’s critics had argued.

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<sup>611</sup> Ibid.

<sup>612</sup> Ibid.

Likewise, Shakespeare's concern that too much focus on social disablement risks leading to a complete neglect of cure and medical treatment is tackled when the CRPD secures not only access to the outside world but also access to health care. Along the same lines, the Preamble does not only talk about 'barriers,' both social and attitudinal, but also structural power imbalances that need to be restored. Persons with disabilities should, for instance, "be actively involved in decision-making processes" when political and legal norms are laid down. Seen from this viewpoint, the 'social model' that the CRPD adopts is actually a very informed version of its archetype which has integrated – precisely as Oliver had argued it was capable of – some of the most prominent concerns originally directed at it.

The second argument made here regarding the social model, links the social model discourse with the discussion about the human self and concerns the analogies between these two discourses. Many of the critical views within the sociological realms were actually initiated by women disability scholars that were sharing their own experience of disability. Some contributions, such as Wendel's seminal Article "Toward a Feminist Theory of Disability" in 1989, were in fact urging for a more feminist-oriented understanding of disability. This might also explain why these two lines of scholarships come so close even if they are not bridged to the extent one might expect. By way of illustration, the concern that the 'social model' focuses too much on material barriers and leaves out the emotional pain of disability closely relates to the relational criticism about the counter-intuitive calculative and atomistic view of the self and the call for its replacement by a more emotional subject. The argument in favour of a more personalised understanding of disability issues is analogous to the contextualisation of autonomy that relational theorists support. Thomas' inquiry into the impact of relations as a form of coercion is obviously a concern shared with relational accounts.

Seen as such, an understanding of the CRPD person as a fundamentally relational person from a legal theory perspective, as was argued here, does not challenge in anyway the 'social model' doctrine; because the social model neither implies a third category of the human self (beyond the individualistic or relational account) nor doctrinally challenges the main positions of relational theories of the self. Quite the contrary, the social sciences discipline from where we borrowed the term "social model" and transferred it to the human rights discourse has actually closely followed the developments taking place at the philosophical level about the human self, and has integrated the main lines of inquiry into its discussion. The position thus that the CRPD

has been based on a fundamentally relational view of the human person is not counter-intuitive. The CRPD stands at the end of a progression in three discourses<sup>613</sup> — human rights, disabilities and legal theory — which have been moving in the same direction. For the purposes of the present analysis the section will not inquire further into this shared path since it is a separate discussion. Turning back to the question of the human subject within human rights law and how this shapes our concept of positive obligations, the next two sections will look closer into the 'innovative' analytical human rights framework that the CRPD image gives rise to.

## 6. The CRPD relational approach to human rights

Should the CRPD person indeed correspond to a relational perception of the self, then it is reasonable to expect that it would give rise to a framework of human rights that would fundamentally amend or even 'remedy' the weaknesses of the mainstream individualistic structure. As a matter of fact, several contributions have pointed out what appears to be a series of doctrinal innovations in the CRPD's interpretation of human rights compared to the mainstream framework<sup>614</sup>

One such major innovation, which has almost monopolised contemporary human rights scholarship, is the CRPD's approach to legal personhood and legal capacity. While no human rights treaty actually denied legal personhood, some commentators have pointed out that mainstream documents such as the ICCPR were silent or more ambivalent on certain aspects. The CRPD, by contrast, is the first treaty to explicitly acknowledge that everybody is entitled to legal personhood and everybody may require support to exercise legal capacity.<sup>615</sup> It thereby takes matters further than previous thematic treaties like the CEDAW by obliging States to immediately acknowledge as a matter of law these rights to everybody, even for persons with

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<sup>613</sup> One might even argue four if we take into the account the discussion about justice within political science and, in particular, the dichotomy between capabilities-based and egalitarian accounts which we will discuss in our conclusion

<sup>614</sup> One of the first contributions was F. Megret, "Towards a Holistic Concept of Rights", *The International Journal of Human Rights*, Volume 12, Issue 2, 2008, pp. 261-278;

<sup>615</sup> CRPD, Article 12; See Committee on the Rights of Persons with Disabilities, General Comment 1, Article 12, 2004, paragraph 11: "This guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity. " ;For a discussion of the drafting process see A. Dhanda, Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future, *34 Syracuse Journal of International Law and Commerce*, 2006-2007, pp.429 to 462; see also E. Flynn and A. Arstein-Kerslake, "The Support Model of Legal Capacity: Fact, Fiction or Fantasy?", *Berkeley Journal of International Law*, Vol. 32, No 1, 2014, pp. 124-143

the most severe cognitive impairments.<sup>616</sup>

A second major innovation is the CRPD's integrated approach towards positive and negative rights. While human rights law has been shifting in the same direction, there is scholarly consensus that the CRPD interprets rights and overcomes the positive-negative dichotomy in a much more holistic manner compared to previous treaties. Socio-economic and civil political rights are both equally present in the treaty and they are equally justifiable through the CRPD's complaints mechanism. As Mergret aptly points out, in many provisions positive and negative aspects of the same right are merged together making their separation impossible, underscoring their invisibility and interdependence.<sup>617</sup>

The CRPD has also been applauded for overcoming the private-public divide in a much more dynamic manner compared to previous treaties, requiring States to take measures to eliminate discriminatory attitudes committed “by any person, organization or private enterprise.” More than previous treaties, Mergret argues, the Convention delves deep into the private sphere by also formally acknowledging that persons can be prevented from exercising their human rights “also in the privacy of their own homes and personal relations.” Characteristic examples are, for instance, Article 16 on freedom from exploitation, violence and abuse and Article 8 on awareness-raising, which specifically extend their scope into the private sphere.<sup>618</sup>

These and many more of the innovations present in the CRPD have been attributed by human rights scholars to the participation of persons with disabilities in the drafting process — participants who arguably informed the context of the Convention with their real life experiences. In line with this reasoning, substance-wise the CRPD differs from previous treaties because it is to a lesser extent a product of diplomatic officers negotiating human rights in abstract. From the standpoint of this thesis, however, which seeks to explain and analyse human rights as well as any developments from a legal perspective, all these innovations are a direct consequence of the vision of the human subject underpinning the CRPD and, in particular, its relational perception of selfhood.

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<sup>616</sup> See Background Conference Document prepared by the United Nations High Commissioner for Human Rights on Legal Capacity in view of the 5<sup>th</sup> Session of ad hoc Working Group Committee

<sup>617</sup> Scholars agree that the initial distinction in CRPD Article 4par.2 is effectively abandoned. “With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law”

<sup>618</sup> F. Megret, “Towards a Holistic Concept of Rights”, pp. 261-278; Statement by Louise Arbour, UN High Commissioner for Human Rights, General Assembly Ad Hoc Committee, 7th Sess., (27 January 2006)



In fact, from our standpoint the CRPD's innovations are, in a way, justifying relational theorists' claims regarding what a relational framework is capable of achieving. The principle of 'universal legal capacity' that the CRPD affirms and its emphasis on the 'will and preferences' of the person are directly traceable to the abandonment of rigid rationality as a pre-requisite of autonomy and the emphasis on inner feelings and values. The blended approach towards socio-economic and civil-political rights, and positive and negative rights, is also a direct outcome of this relational image; the relational subject is presumed to be dependent and in need of external material support to exercise all of his/her rights. Likewise, the private-public divide is overcome because relational theorists do not maintain the individualistic separation between the self and the collectivity. Seen as such, the CRPD offers a living model for a relational analysis of human rights. Within this discourse, the question of relations and positive obligations has received less attention, possibly because issues like legal personhood and access to 'socio-economic' rights that touch on the foundations of our mainstream approach towards human rights have stirred up long-standing debates.

## **7. The CRPD doctrine on positive obligations**

In terms of human rights analysis, the CRPD follows a distinct obligations-based approach to explain rights, with a particular emphasis on positive obligations. Its lengthy text contains a longer and richer list of obligations than to previous human rights treaties, an aspect attributable to circumstances of its drafting. The concern to cover all important issues and put in place the necessary safeguards outweighed worries about text economy.<sup>619</sup> All substantive Articles correlate to or are phrased in terms of positive obligations and many of them go into practical details when listing the necessary measures to bring the Convention to full realisation (eg sign language, Braille). A characteristic example is the right to legal personhood (Article 12). Normally found as an one-sentence entitlement, in the CRPD it is phrased in positive duty terms and includes, amongst others, the duty to ensure access to “bank loans, mortgages and other forms of financial credit.”<sup>620</sup>

At a theoretical level, the CRPD approach has been praised for offering a holistic framework for human rights that, better than previous efforts, transcends the unhelpful legacy of the positive-

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<sup>619</sup> See for eg the Daily Summary Discussions on Personal Mobility, Third Session of ad hoc Committee,

<sup>620</sup> See ICCPR Article 16 and CRPD Article 12

negative dichotomy. By reading positive and negative duties into all of its rights,<sup>621</sup> the CRPD language makes it clear that all human rights give rise to a spectrum of both positive and negative duties and that they are both equally important for the realisation of the right. In highlighting the effort of the CRPD to compensate for any negative duty with a positive one, scholars have identified how traditionally negative rights, such as the prohibition of torture, are also couched in positive duty terms, (“to take all effective legislative, administrative, judicial or other measures to prevent torture from happening”).<sup>622</sup> Sometimes the interaction between positive and negative duties is particularly close, as in Article 22 on the right to privacy (“No person with disabilities... shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. Persons with disabilities have the right to the protection of the law against such interference or attacks.”).

On the question of whether this blended positive-negative obligations approach reflects an intention to abandon altogether the conceptual distinction between positive and negative obligations, the messages are rather mixed. It is likely, though, that the Committee would like to move into this direction. The text of the CRPD itself is structured in terms of both positive and negative duties. The Committee itself, however, has explained that:

“Implicit in the Convention are three distinct duties of all States parties: *The obligation to respect* – States parties must refrain from interfering with the enjoyment of the rights of persons with disabilities. *The obligation to protect* – States parties must prevent violations of these rights by third parties. *The obligation to fulfil* – States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights.”<sup>623</sup>

In the two General Comments that it has issued so far, the Committee starts out by referring to this trichotomy of duties. It then, however, appears to analyse the corresponding obligations of each Article according to their progressive or immediate nature without referring further to their

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<sup>621</sup> F. Megret, “The Disabilities Convention: Towards a Holistic Concept of Rights”

<sup>622</sup> See in particular A.S.Kanter, “The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities”, *Syracuse Journal of International Law and Commerce*, Vol. 34, 2006-2007, pp. 287-321; R. Kayess and P. French, “Out of the Darkness and into the Light? Introducing the Convention on the Rights of Persons with Disabilities”, *Human Rights Law Review*, Vol. 1, No 1, 2008, pp. 1-34; F. Megret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?”, *Human Rights Quarterly*, Volume 30, No 2, May 2008, pp. 494-516; D. MacKay, “The United Nations Convention on the Rights of Persons with Disabilities”, *Syracuse Journal of International Law and Commerce*, Vol. 34, 2006-2007, pp. 323-331

<sup>623</sup> See <http://www.un.org/disabilities/default.asp?id=225>; See also OHCHR, “Monitoring the Convention on the Rights of Persons with Disabilities”, Guidance for Human Rights Monitors, Geneva, 2010

nature as respect-protect-fulfil. In its case-law, the Committee does not appear to rely on this trichotomy when examining a case. In the table of summaries of its decisions, for cases dealing with positive obligations we more often find the terms “failure to” and “denial”, while negative obligations are more often described as “refusal” or a description of the violation is given. When it comes to examining the merits, this classification is abandoned altogether and the Committee appears to simply question whether there was, on the part of the State, a “failure to fulfil its obligations” under the Convention.

One likely explanation could be that the Committee does not challenge the normative distinction between positive-negative duties *per se*, but avoids using a terminology that has traditionally led to lower thresholds of protection. Another possible explanation, however, is that the Committee may be moving in the direction of abandoning negative obligations altogether and to read in all cases a positive obligation within the meaning of failure to protect the right at stake. For the reasons analysed already in Chapter III, the position taken here is that if we follow a more moderate relational approach it is always possible to distinguish between positive and negative duties. Abandoning the concept of negative obligations altogether entails the risk of eventually eliminating any notion of individuality.

When it comes to analysing positive obligations, the CRPD Committee has formally adopted two more categorisations: first, on the basis of content it divides positive obligations into those of a legislative, administrative and judiciary nature ; and, second, on the basis of their temporal scope, into those of progressive and immediate implementation.<sup>624</sup> While the precise nature of an obligation is decided on an Article-per-Article basis, legislative obligations are generally understood to be of immediate implementation for all rights.<sup>625</sup> The Committee has made it clear, though, that even in the context of positive obligations that require gradual implementation, States still need to take concrete steps and set time frames in order to achieve the full realisation of the right.

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<sup>624</sup> A distinction attributable primarily to concerns among developing States about the costs entailed in bringing the treaty to its full realisation, see D. MacKay, “The United Nations Convention on the Rights of Persons with Disabilities: Syracuse Journal of International Law, Non 34, 2006-2007. pp. 323-331; while Article 4 states that it is primarily socio-economic entitlements giving rise to progressive realisation, the CRPD has abandoned this classification and examines each duty separately on an Article per Article basis.

<sup>625</sup> Ibid.; Interestingly enough, the language of the obligations, for example “ensure” or “shall”, which might imply more immediate realisation compared to “undertake to take measures”, “encourage”, “promote” does not appear to be crucial when the Committee decides on its cases.

## 8. The dual structure of positive obligations

The biggest innovation of the CRPD in terms of positive obligations has been the addition of a second dimension in the structure of positive obligations; a direct consequence, as this thesis argues, of the relational theory of selfhood underpinning the Convention. The CRPD breaks through the traditional structure of positive obligations by adding the component of relationships. We can thereby discern in the text of the treaty both kinds of relational patterns we identified earlier, namely the interaction between citizen-State and the relationships between the rights holder and his/her fellow humans. Article 4, on States' General Obligations under the Convention, includes within its list of general commitments to train “professionals and staffs working with people with disabilities... so as to better provide the assistance and services guaranteed by those rights” as well as “to eliminate discrimination on the basis of disability by any person, organisation or private enterprise”. The importance of training authorities and professionals dealing with persons with disabilities as well as of shaping positive social attitudes is reiterated throughout the Convention across individual Articles. Within the text of the treaty we find ample references to personal relations across the various spheres of life, such as family, in the classroom, at work, in the context of communal activities, but also of a more formal nature, such as in the context of interaction with officials, professionals and public authorities. In terms of legal analysis the text of the CRPD does not treat relationships as a separate category of obligations but integrates this relational dimension into the structure of positive obligations along with the material aspect. By way of illustration, when it comes to access to justice — a judicial positive obligation — it is not enough for the State to construct the court building, it also needs to make sure that the judges are trained (Article 13). This is because infringement of a right may also lie in the relationship between the judge and the applicant — for instance, when the judge is unaware of or indifferent to the needs of a person with disabilities. When it comes to the right to education, the administrative positive obligation is not discharged by setting up the education system; education also needs to be delivered through fostering relations with teachers, peers and mentors (Article 24) because the denial of the right may also emanate from the relationship to an insensitive teacher or to bullying classmates. Likewise, when it comes to ensuring the right to vote (a legislative positive obligation) it is not enough to allow for assisted voting; the assistant needs to be chosen freely by the rights-holder (Article 29). Both material and relational elements together form part of the same obligation to protect the right at stake.

Some individual Articles are more explicit than others, as is also the case with the material measures, depending on where the drafters felt that more information on the content of the right was needed.<sup>626</sup> However, when mentioned, the list of relationships that matter is not exhaustive, in the same way as there is no upper limit for material provisions. In cases where this relational dimension is made more explicit, the Convention uses the term “including”.

As regards the quality of the relationship, within the text itself Article 2 on the General Principles of the Convention and Article 8, which further defines these in the context of awareness-raising, are of particular relevance in extracting principles of what makes an optimal social setting.

In particular, Article 2 lists the following principles which ought to guide the overall interpretation and application of the Convention:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The Committee has thus far not offered a formal interpretation of Article 2. In its General Comment on Accessibility it has explained though, that accessibility encompasses not only physical accessibility but also accessibility to positive social attitudes. In its case-law, the Committee tends to summarily refer to these principles as respect, equality, individual autonomy or independence and participation, which includes participation in decision-making processes.<sup>627</sup> As will be analysed in more detail below, the Committee sometimes relies on only some of those principles to analyse positive obligations and at others invokes all of them at the same time. To an extent this seems to correlate with how explicit is the wording of the Article on which it relies.

At a scholarly level, it is primarily the notion of participation that has attracted most attention.

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<sup>626</sup> See in particular the diverse problems identified by NGOs on the enrolment of children in mainstream schools during the Daily Summary of Discussions on Education, Third Session of the ad hoc Committee

<sup>627</sup> <http://www.un.org/disabilities/default.asp?id=224> ;

Some early contributions read into the emphasis placed on the notions of inclusion and participation a new disability-specific human right. The argument made was that while some forms of participation were also foreseen in previous human rights treaties, such as participation in political life, the CRPD places a new demand of a much broader scope to include persons with disabilities in society.<sup>628</sup>

The Committee itself has explained that participation is both a right and a principle. By taking the example of the right to participate in the political life, it has argued that while participation is in this case a right, certain actions will still be needed to realise this right, such as the provision of personal support or the construction of ramps to ensure that one's choices are respected. From our standpoint, participation as a principle, both within the meaning of social participation and its more specific meaning of participation in decision-making processes, flows from the deeper notion of sociability and the relational conception of the self, which permeates the whole Convention. In its broader sense it equates to the ability to choose and enter into supportive relationships, which we treat as an integral component of all rights and obligation. In its more specific form it relates to the interaction between State and individual. This reading finds support, amongst other places, in the Preamble of the Convention, which distinguishes between participation in general, that enhances one's "sense of belonging" to society,<sup>629</sup> and participation in decision-making processes, policies and programs that affect one's life. In both its forms it expresses the role of a conducive social environment for the realisation of the rights. If we compare the principles listed by the CRPD to our suggested analytical framework then at first reading we can find a certain degree of alignment. For instance, our position that the interaction between State-citizen ought to be regulated by participation in decision-making processes, dignity and agency, finds support in principles (c) on participation, (a) and (d) on acceptance and respect, and (a) and (h) on individual autonomy and respect for evolving capacities. The notions of accessibility under principle (f) and full participation and inclusion

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<sup>628</sup> See F. Mergret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?", pp. 508-509;

<sup>629</sup> For a discussion on the notions of inclusion, participation through the lens of the feeling of belonging, see in particular A. Power, who argues that these two notions speak "to the essence of sustaining relationships and the reciprocity inherent in valued connection". Participation, he explains, is about empowerment and inclusion about openness and building connections across spheres and time. "Making space for belonging: Critical reflections on the implementation of personalised adult social care under the veil of meaningful inclusion", *Social Science and Medicine*, Vol. 88, July 2013, pp. 68-75; E. Hall, "Spaces of social inclusion and belonging for people with intellectual disabilities", *Journal of Intellectual Disability Research*, Vol. 54, Suppl.1, pp. 48-57, 2010; C. Bigby and T. Clement, *Group Homes for People with Intellectual Disabilities: Encouraging Inclusion and Participation*, Jessica Kingsley publ., 2010, p. 81 ; K. S. Quick and M. S. Feldman, "Distinguishing Participation and Inclusion", *Journal of Planning Education and Research* Vol.31, No 3, 2011, pp. 272-290

under principle (c), and principle (a) about independence of the person, all relate to the possibility of establishing relationships without entering into a situation of deep dependence as part of realising autonomy. Principles (b), (e) and (g) are all different components of a more enhanced understanding of the concept of equality. Equality seems to serve, thereby, as the overarching principle against which overall progress will eventually be judged. As will be demonstrated below, this first finding finds support if we relate the Committee's analysis of positive obligations to our framework.

## 9. The relational analysis of positive obligations in the practice of the CRPD Committee

In the context of individual complaints, the Committee's analytical model comes closer to the reasonableness test, although the Committee itself refers to it as a “full realisation” approach. In particular, in assessing whether a State has fulfilled its obligation or not, the Committee follows a three-step inquiry comprising the following questions: a) what concrete steps have been taken by the State party's authorities to realise the right; b) what concrete steps were taken to address the applicant's situation; and, c) what were the main difficulties encountered. If the Committee is not satisfied, then “a failure to fulfil the right” will have been found. In addressing these questions the Committee reads the Article at stake in light of the general principles and on this basis it then develops its analysis. It thereby does not explicitly distinguish between the relational and material components of the obligation. From our standpoint, however, both dimensions are clearly distinct in the Committee's reasoning and holistically considered when assessing whether a violation took place. In this sense, as we will argue in the rest of this section, our framework does not normatively alter the Committee's reasoning but simply systematises something that, in fact, the Committee is already doing, albeit in a less uniform manner in the different cases.

The Committee has so far examined the merits of seven<sup>630</sup> individual communications, out of

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<sup>630</sup> The following cases were declared inadmissible on procedural grounds: *Kenneth McAlpine v. The United Kingdom of Great Britain and Northern Ireland*, CRPD/C/8/D/6/2011, UN. Doc.; *Ms S.C. v. Brazil*, CRPD/C/12/D/10/2013, UN.doc; *A.M. v. Australia*, CRPD/C/13/D/12/2013, UN.doc; Among those examined in their merits, *H.M. v Sweden*, dealt with a negative obligation, namely “the refusal to grant building permission for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability on grounds of incompatibility of the extension in question with the city development plan”, CRPD/C/7/D/3/2011, UN. Doc; *Zsolt Bujdosó and five others v. Hungary* dealt with a negative obligation, namely the restriction on voting rights on grounds of disability, CRPD/C/10/D/4/2011, UN.doc; *A.F.v. Italy* dealt with discrimination in recruitment process via public competition which prevented the author from being recruited was found unsubstantiated,

which three raised issues related to positive obligations. The first, *Szilvia Nyusti, Péter Takács and Tamás Fazekas v. Hungary*,<sup>631</sup> concerned the failure of a private bank to make its ATMs accessible to persons with visual impairments. The second, *X. v. Argentina*<sup>632</sup>, related to inappropriate conditions of detention. The third, *Liliane Gröninger et al. v. Germany*,<sup>633</sup> concerned the failure of the German State to facilitate access to the labour market of a person with a disability. In all three cases a violation was found.

In terms of the taxonomy relied on earlier, *X.v.Argentina* would belong to the first category, since the call for assistance arose following a prior State behaviour, in this case one which deprived the applicant of his/her liberty. The case of *Szilvia Nyusti, Péter Takács and Tamás Fazekas v. Hungary* regarding access to ATMs is a case of the second category since it was because of the actions of a private party, the bank company, that the applicant called upon the State for assistance. *Liliane Gröninger et al. v. Germany*, on access to the labour market would belong to the third category, since the cause of the harm was not directly attributable to anybody; the applicant was merely asking for assistance by the State to realise his/her rights. In all three cases a violation was found, which renders the protection threshold equal for all three categories thus far.

#### 10. Obligation to provide assistance following an immediate prior behaviour by the State

In *X. v. Argentina*<sup>634</sup>, the applicant, who was in pre-trial detention, complained that the conditions in his cell and the prison complex were not suitable for persons with physical disabilities. In addition, he received insufficient rehabilitation and medical therapy and his outpatient treatment exposed him to serious health risks due to his frequent transport by ambulance. The Committee eventually found a violation with respect to his detention conditions on the basis of Article 9 (Accessibility) , Article 14 (Liberty and Security of the Person) and Article

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CRPD/C/13/D/9/2012; *Mrs Maria-Louise Jungelin v. Sweden*, was about refusal of appointment to the social agency on reasonable accommodation grounds, CRPD/C/12/D/5/2011, UN.doc

<sup>631</sup> CRPD, *Szilvia Nyusti, Péter Takács and Tamás Fazekas v Hungary*, Decision of 16 April 2013, CRPD/C/9/D/1/2010, UN. doc

<sup>632</sup> CRPD, *X. v. Argentina*, Communication No 8/2012, Decision of 11 April 2014, CRPD/C/11/D/8/2012

<sup>633</sup> CRPD, *Liliane Gröninger et al. v. Germany*, Communication No 2/2010, Decision of 4 April 2014, CRPD/C/11/D/2/2010, UN doc.

<sup>634</sup> Supra fn.



17 (Integrity of the Person) but dismissed his complaints under Article 25 (Health) and Article 26 (Habilitation and Rehabilitation).

As regards the living conditions inside his cell and the prison facilities, the discussion between the State and the applicant focused on three issues: access to the bathroom, access to the recreation yard and access to the nursing services. The applicant argued that he had been deprived of all that and that he had to rely on a nurse to cover his basic needs, who was not always available. The authorities refuted his claims on grounds that nursing staff were available round the clock. Moreover they had subsequently made some modifications to the bathroom in his cell, had adjusted the door to the recreation yard and that in any case his case was under constant judicial monitoring.

The Committee set out by underscoring that the right to liberty under Article 14 CRPD, read in light of the General Principle of accessibility, imposed a positive obligation upon States to ensure that persons with disabilities deprived of their liberty would be able to live independently and fully participate in the daily communal life of the prison:

“The State party is under an obligation to ensure that prisons afford accessibility to all persons with disabilities who are deprived of their liberty. States parties must take all relevant measures, including the identification and removal of obstacles and barriers to access, so that persons with disabilities who are deprived of their liberty *may live independently and participate fully in all aspects of daily life in their place of detention*; such measures include ensuring their access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical, psychological, social and legal services.”

In testing the measures undertaken by the State against this benchmark, the Committee took note of what can be best described as a compilation of infrastructural interventions to the building and of interactions between the applicant, his fellow inmates and State officials.

“The Committee takes note, on the one hand, of the author's claims that his cell... is unsuitable for persons with disabilities. The accommodations made by the prison authorities are insufficient because the bathroom is too small ... and he cannot get to the toilet or shower on his own and therefore depends on help from a nurse or other person. Although a call button was installed, it often takes some time before someone responds. [...] He can only attend to his basic needs using bedpans or other such devices, and the lack of assistance from others means that he cannot clean himself on a daily basis. [...] On the other hand, the Committee takes note of the State party's observation that the authorities made the necessary modifications to remove the

step that had hindered access to the bathroom and shower. Furthermore, the judicial authorities and officials of the Gendarmería Nacional and the Public Legal Service toured the site and ascertained that elevators existed and were in working order, that a door to the recreation yard had been specially fitted to accommodate the author and that a functioning call button existed to summon a nurse, with nursing staff being on duty around the clock.”

It concluded however that the State's performance was unsatisfactory, access had not been ensured and no reasons had been invoked to justify those deficiencies:

“However, the Committee considers that the State party has not irrefutably demonstrated that the accommodations made in the prison complex are sufficient to ensure the author’s independent (insofar as possible) access to the bathroom and shower, recreation yard and nursing service.”

A violation of Article 14 and consequently the rest of the Articles was found.

It is useful at this stage to examine more closely the Committee's rather dense reasoning before proceeding to the second part of the judgment about medical treatment. In particular, if we disentangle from one another the many different components in the Committee's reasoning, then we can discern two intertwined lines of evaluation which permeate the whole structure of the obligation: the material and social setting within which the right was exercised.

Having established that the right to liberty entailed the positive obligation to provide access to the various facilities within a prison establishment, the Committee then went on to define the scope of this obligation. It did so relying mainly on the applicant's need for sociability. The State, the Committee explained, had to ensure that in providing access to the physical environment of the prison, the rights-holder would be able to live in an independent manner and also participate in prison life; if we rephrase that, the services provided should ensure that the rights-holder is be able to socialise with others without suffering a loss of independence.

On this basis, the Committee proceeded in evaluating the State's behaviour by taking into account a series of parameters, which we can group into three categories. First, the material resources provided — in this case a cell with a small-sized bathroom, which was later modified, a summon button, and a wheelchair-unfriendly prison establishment that was later fitted with an elevator and a wider door leading to the recreation yard. The second category dealt with the social setting and, in particular, the applicant's relationships to the other inmates. The Committee noted that the applicant often had to rely on fellow inmates to call the nurse

responsible for aiding him. The third category dealt with the applicant's interaction with the officials involved in his imprisonment, namely the prison staff, the unresponsive nurse and the judicial authorities monitoring the situation. What we can already establish at this stage is how the obligation brings together considerations not only of a material aspect but also a whole net of interactions surrounding the applicant; the sociable inmate, as opposed to the isolated detainee, is the image guiding the Committee's reasoning.

We can now look closer at how these three considerations complemented each other, leading to the final finding of a violation.

To fulfil its obligation, the State had provided some material conditions, including a summon button through which the applicant could call a nurse to help him. In the course of the imprisonment, it had also undertaken further infrastructural adjustments. In assessing whether these were adequate, the Committee first added to the consideration how these impacted on his relationships with the other inmates. In doing so, it first underscored the importance of ensuring 'independent living and full participation in the prison life on an equal basis with others' as an integral component of the obligation. It then acknowledged that while some action had been taken to ensure the applicant's "access to areas within the physical environment of the prison," "the State party has not irrefutably demonstrated that the accommodations made in the prison complex are sufficient to ensure the author's independent (insofar as possible) access to the bathroom and shower, recreation yard and nursing service."

From our reading of the judgment, in these two sentences the Committee essentially meant to address two issues: first, whether the measures taken allowed the applicant to enter into and take part in the social life of the prison in the first place; and, second, whether in establishing relationships, he maintained his independence, in other words was not entering into a situation of great dependence. In fact, both issues had been raised by the applicant in his observations before the Committee. The applicant had complained that, amongst other issues, "he was unable to access the recreation yard for the first 8 months of his imprisonment" , In addition, both by being confined to his cell and by not having access to the same educational and therapeutic tools and opportunities as other inmates he would have difficulty in the future to reintegrate into society and the labour market. In the overall, he could not attain "the kind of life led by other inmates".<sup>635</sup> He also complained that in order to cover his needs he had to rely on a daily basis on the "goodwill of other inmates" to summon the nurse and the prison staff.

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<sup>635</sup> Par. 3.5

While it is obvious from the Committee's final wording that independence had been lost, it is not as clear in the end to what extent that was the result of the lack of access in the first place; in other words whether participation had been achieved but not through independent access, or whether neither participation nor independence had been respected. (“[T]he State party has not irrefutably demonstrated that the accommodations made in the prison complex are sufficient to ensure the author’s independent (insofar as possible) access to the bathroom and shower, recreation yard and nursing service.”) In any case, if we relate the decision to our framework, then the reasoning up to here is consistent with our suggestion of measuring the scope of the obligation on the basis of its material and social adequacy, namely the ability to establish supportive relationships without entering into a situation of dependence.

In reaching its conclusion, however, the Committee also took note of the applicant's reliance on a nurse and other prison staff who were not always available or responsive, which the applicant found humiliating, but also of the judicial authorities monitoring the overall situation. The Committee appears to have critically appraised the interaction with the former and positively appraised the role of the judicial authorities.

In particular, as regards the former, the applicant complained about the humiliation he felt having to wait for an unresponsive or unavailable nurse to aid him to access the bathroom. The Committee accepted his argument but did not address the humiliating effect as such. Instead, focusing on the part of reliance on others, in finding a violation the Committee analytically combined it under the requirement of “independent (insofar as possible) access”. This reading is corroborated by the Committee's observation that “he cannot get to the toilet or shower on his own and therefore depends on help from a nurse or other person,” which seems to reflect some equalisation between the sense of dependence the applicant experienced *vis-à-vis* the inmates and the one *vis-à-vis* the nurse.

If we would examine however his complaint through our analytical framework, then the emphasis would be on the sense of humiliation he experienced in his interaction with the authorities, which is also what the complaint was really about within this context. Having to wait has been considered by relational theorists to have a damaging effect on one's self-conception in the context of one's relationship to the State and its inherent power imbalance. The Committee eventually also found on the basis of the same facts that the applicant had been placed in “substandard conditions of detention” a violation of Article 17 (Integrity of the Person). Analytically speaking, however, the mental and physical suffering he experienced overall is a

distinct issue from the effect his interaction with the State had in the exercise of his right to accessibility. In essence, the only part where our framework departs from the Committee's approach is that we treat its impact separately from the disabling sense of dependence he experienced towards his inmates.

We have left to last the applicant's interaction with the judicial authorities. Even though the Committee listed those authorities' monitoring role among the positive steps they had undertaken, the final conclusion (the measures were not "sufficient to ensure the author's independent (insofar as possible) access") gives us little information about how judicial monitoring was weighed within the overall analysis. To understand the Committee's implicit approval, it is useful to look into the facts of the case.

In particular, in its observations the State pointed out that as part of securing the appropriate detention conditions, they had arranged for frequent judicial monitoring. The applicant himself did not in fact raise any complaint in this respect. What is of particular interest in the present case is how the monitoring took place. The facts of the case reveal that the applicant had accessed the judicial authorities on several occasions to complain about the deterioration of his health and request to be placed under house-arrest. While the latter's claim was not vindicated, the judicial authorities were in close co-operation with the hospital doctors tending to the applicant's needs. They had visited the facility and had interviewed the applicant during one of these visits. On several occasions they had ordered adjustments to better suit the applicant's health needs and received periodic reports by the prison authorities updating them on the applicant's situation. The judicial supervision in other words had been attentive to the applicant's situation and had asked for better conditions of detention by means of active and regular direct and indirect involvement of the applicant.

Even though the supervising judicial authorities had undisputedly contributed to ensuring the right and the Committee did mention them with a positive assessment, analytically speaking the Committee was less clear about their position within the overall scheme. In its final conclusion it stated that while "the Committee acknowledges the accommodations made by the State party in order to remove the barriers" within the physical environment of the prison, these had not been "sufficient to ensure the applicant's independent (insofar as possible) access". Within our framework, their positive role would have fallen together with the negative interaction with nurses and prison staff within the ambit of the applicant's overall interaction with the State.

In the Committee's final conclusion, that in view of all the above the State had not secured the

applicant's "independent (insofar as possible) access to the bathroom and shower, recreation yard and nursing service" we can essentially read an implicit acknowledgment of the following: while the State had in this case provided some resources to ensure adequate conditions of detention, these were inadequate because in the end the only way for the applicant to exercise his right was through disempowering relationships; an unresponsive State and the goodwill of the inmates. What was left out from the conclusion, even though it had until then found its way into the Committee's reasoning, was the applicant's fostering interaction with the judicial authorities, his sense of humiliation (as opposed to sense of independence) towards the nurses and prison staff and his overall participation in the social life of the prison.

To further corroborate our reading of the Committee's analysis, it is useful at this stage to also look at the second part of the judgment, on the applicant's access to health care and rehabilitation (Articles 25 and 26). Here no violation was found. The applicant had complained that the treatment he received inside the prison was inadequate due to the lack of the necessary equipment and that the outpatient treatment had exposed him to physical hardship. He also complained that the trips to the hospital often coincided with the allocated visiting times as a result of which he could not see his family and friends on those days. The State counter-argued that health care had been adequate, that he had on several occasions refused to undergo rehabilitation and that the judicial authorities were monitoring his situation. Eventually the application was rejected on grounds that his complaints were not supported by the available evidence.

In examining the case, the Committee cited the rather lengthy Articles on health and rehabilitation of the Convention to define the meaning and scope of the obligation. It thereby acknowledged that there was a positive obligation on the State to provide every person with a disability with the highest attainable standards of health care and rehabilitation and that the authorities bore a special responsibility when exercising significant control or power over a person deprived of his liberty. Most crucially, it noted that any health and health-related treatment provided had to be based on a multidisciplinary assessment of the person's individual circumstances:

"States parties shall take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life, through comprehensive habilitation and rehabilitation services and programmes in such a way that they begin at the

earliest possible stage and are based on the multidisciplinary assessment of individual needs and strengths.”

“In the light of these provisions, read in conjunction with article 14, paragraph 2, the Committee recalls that States parties have a special responsibility to uphold human rights when prison authorities exercise significant control or power over persons with disabilities who have been deprived of their liberty by a court of law.”

In examining the merits of the complaint, the Committee observed that the available evidence was conflicting about the quality of the treatment received. It accepted, however, that the applicant's access to health care had been irregular to begin with, that on several occasions he had refused to accept the treatment selected by the prison authorities, but that once the judicial authorities became engaged, however, the situation seemed resolved:

“since his arrival at the Ezeiza Prison on 26 May 2011, the prison has failed to provide the rehabilitation therapy prescribed by his attending physicians at the FLENI Institute on a regular basis. However, the author has on occasion refused to undergo rehabilitation treatment at the Ezeiza Prison or outside hospitals selected by the authorities. As a result of action taken by the Federal Chamber of the Criminal Court of Cassation, the author has had regular physiotherapy and psychotherapy sessions at the San Juan de Dios rehabilitation centre and the prison hospital since July 2013. The Committee is aware that the statements of the author and the State party regarding the quality and quantity of the author's rehabilitation treatments while in prison are contradictory”

Noting that the applicant's complaints about his health problems were not corroborated by evidence and that in any case “the courts have taken steps to respond to the author's medical needs”, no violation was found.

What is particularly striking here, in particular if compared to the previous analysis under the right to accessibility, is the prominent position allocated to the interaction between applicant and State. In examining whether health care of the highest attainable standards had been provided, the Committee essentially ended up invoking the quality of the relationships it was provided through. The applicant emerges thereby as standing in an enduring relationship with the State, the fostering role of which seems, in the end, instrumental in the realisation of the right.

In particular, in solving the dispute at stake, the Committee cited the Convention to describe the meaning and scope of the obligation. This entailed ensuring not only the person's opportunity to attain good bodily health but also full inclusion and participation in all aspects of life and

independence. We can see here again how the obligation, cited directly from the CRPD, comprises not only the material well-being of the person but also his/her opportunity for a social life. In reviewing the facts of the case, however, the Committee did not engage into an analysis of the scope, noting that “there is no doubt that the author requires health care and rehabilitation.” By focusing solely on the applicant's obvious health problems the Committee overlooked the applicant's complaint about the disruption of his relationship to his family and friends on account of the medical visits. On this narrower basis, the Committee proceeded to examine the fulfilment of the obligation. In doing so, citing again the CRPD, the Committee noted that any measures to protect the right to health had to be taken<sup>636</sup> in such a way that treatment would be afforded early and was “based on the multidisciplinary assessment of the applicant's needs and strengths.” In other words, the positive obligation would not get discharged by offering prompt medical treatment, but also by providing any treatment in a manner that took account of the recipient's situation; a requirement which was necessarily going to shift the focus to the applicant's input and involvement.

In evaluating the State's performance along these two considerations, the Committee took note of a series of parameters which we may divide into those addressing the adequacy of the treatment and into those reflecting upon the interaction between applicant and State.

As regards, the former, the Committee seemed rather ambivalent in its assessment. It observed that the applicant had been offered some kind of treatment, that there were some interruptions in the beginning but that the overall evidence on its quality and quantity was inconclusive. Intertwined with this was the development of its second line of consideration. The Committee noted that the applicant had at times refused treatment in hospitals selected by the prison staff and that the judicial authorities had duly considered his case and taken steps to protect his health and integrity. From our standpoint, these two observations, unrelated to the quality and quantity of the treatment, reflect an evaluation of the interaction between State and applicant and, in particular, along the lines of agency and participation.

To corroborate further our position, it is useful to look into the facts of the case lying behind these two comments. In particular, the applicant had on several occasions refused to undergo treatment inside the prison as well as in outside medical centres that the prison authorities had

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<sup>636</sup> In the Committee's reasoning we again find the component of sociability when defining the scope of the obligation. As was the case in the first part of its judgment, the Committee also noted here that States ought to undertake measures so as “to enable persons with disabilities to attain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in society”. Given that no complaint arose with regard to private relationships, we are not engaging further with this aspect here.



arranged for him, insisting that he wished to be either released or treated in a better equipped clinic. On the other hand, the medical staff involved rejected his allegations testifying on the state-of-the-art equipment within the assigned facilities. Once the judicial authorities were engaged, they visited and interviewed the applicant, consulted his doctors, arranged for him to receive appropriate treatment including at a clinic of his choice and ordered that his health was monitored through periodic reports. The applicant attended regular treatment ever since.

In other words, and to relate it to our framework, if the first relationship simply respected the applicant's choice not to undergo treatment, the judicial authorities actively involved him within the decision-making processes and reached a choice of treatment tailored to his situation. Seen holistically, namely the absence of sufficient evidence on the quality of the treatment and that "the courts have taken steps to respond to the author's medical needs", the obligation was found to be fulfilled. In other words, in the end and given the overall lack of evidence, it was the fostering interaction with the judicial authorities which dictated the final outcome.

If we now review the decision in its entirety, then the following conclusions can be drawn regarding the Committee's interpretation and application of positive obligations. In the context of both complaints, the scope was defined as entailing the adoption of measures that would enable the applicant to not only enjoy some material goods, but also lead a social life while maintaining his independence. For this interpretation the Committee relied on the text of the treaty itself. This enlarged basis for analysis was eventually used only with regard to the conditions of detention. In the context of the right to health, the Committee narrowed however its focus on the applicant's bodily well-being and overlooked his complaints about the disruption of his family contacts. In appraising, then, on each basis the State's performance, with regard to the conditions of detention the Committee examined the material and social adequacy of the measures undertaken (removal of infrastructural barriers, dependence on goodwill of inmates) and the interaction with the public authorities (unresponsive nurse, engaged judicial authorities). Substance-wise, the Committee concluded that the obligation had not been fulfilled as the only way for the applicant to exercise his rights was through relationships of great dependence. Analytically speaking, in doing so, the Committee appeared to place part of the interaction with the State (unresponsive nurse) in its adequacy test under the notion of independence, equating it with the interaction with the inmates. The other part of the interaction, namely with judicial authorities, meanwhile, lacked a firm standing within the analytical scheme.

As regards the second complaint, the Committee took note of the material adequacy of the State action (in this case medical treatment) as well as the interaction with the authorities (prison staff, judicial authorities). Substance-wise, it concluded that in the absence of concrete evidence about the material adequacy of the obligation, the fostering interaction with the judicial authorities (that had involved the applicant throughout the decision-making process) had discharged the obligation. Analytically speaking, adequacy and interaction with public authorities were dealt with as separate yet interrelated lines of consideration to assess the fulfilment of the obligation.

Should we now reframe the Committee's analysis according to our model, the outcome would be as follows. The right to liberty and security of the person (Article 14) read in light of the CRPD General Principles correlates to the positive obligation to ensure that persons deprived of their liberty have access to the various areas within the prison environment. This entails not only the removal of architectural obstacles and other barriers but also ensuring that in doing so the person has the opportunity to establish relationships of support without entering into a situation of great dependence. In addition, to fulfil the obligation, the State has to demonstrate that in providing the necessary services and goods, it interacted with the recipient in a manner that met the standards of dignity, agency and participation. In this specific case the applicant complaint about his lack of access to the bathroom, recreation yard and nursing services. The State had undertaken some infrastructural changes (i.e. the removal of a step to the shower, provision of a summon button, the installation of elevators), but these were inadequate as the only way for the applicant to access these facilities was by being wholly dependent on his inmates. In addition, it appears that during certain periods of time he was even unable to establish relationships at first place, as he was confined to his cell. In addition, in providing these services the State had failed to establish a fostering relationship with the applicant. While the interaction with the judicial authorities was fostering and had met the necessary standards of dignity, agency and participation (he had been interviewed and his doctors were consulted on a regular basis), the same did not apply to the prison authorities, which treated him in a denigrating manner through their unresponsiveness. As a result, the obligation was violated.

As regards the second part of the applicant's complaints, the right to health care and rehabilitation correlates to the positive obligation to provide access to health care and rehabilitation services. The scope of the obligation entails not only the provision of medical treatment and rehabilitation programs, but also ensuring the applicant's ability to exercise the

right through fostering relationships without entering into a situation of total dependence. In this specific case, the State had provided some measures to ensure the applicant's ability to enjoy good health, namely outpatient treatment and medical services within the prison environment. Its quality and quantity however were disputed, as the applicant's allegations about its inadequacy were not corroborated by the medical reports. In addition, while the applicant had complained that the medical visits impaired his ability to enter into fostering relationships with his family and friends, in another part of his application he argued that he relied on family support throughout his imprisonment (eg. par. 3.4: "His current condition and the lack of assistance from others do not enable him to attend to his daily hygiene needs, and he depends in part on absorbent pads and products provided by his family"). Moreover,, the external clinic was located near to the prison facility, thus making it possible for the applicant to meet with his family (compared, for example, to the case of *Matencio* analysed earlier, who was asked to relocate).

Seen as a whole, the State action appears to have been materially and socially adequate. As regards the manner in which the services were delivered, the applicant had refused to undergo treatment on several occasions, claiming the treatment was inadequate. However, the doctors attending to the applicant had on several occasions confirmed the state-of-the art equipment in the assigned clinics. In addition, the courts that reviewed his case arranged, on several occasions, for the applicant to be examined by doctors, visited him in the prison facility, received periodic updates on his progress and allowed him, on some occasions, to undergo treatment in a clinic of his choice. His agency was thus acknowledged, since the applicant was not presented with the choice of either accept or refuse treatment, rather his views were treated seriously. In addition, he was included in the decision-making process as he was, on several occasions, directly or indirectly consulted and he had been able to voice his needs and clinic of choice. Likewise, there is no indication that he was treated in a degrading manner. The obligation was thus not violated.

In this case, applying our framework would not alter the outcome or add additional substantial elements in the Committee's analysis but it would systematise and unify the analysis applied to the different Articles. It would also bring to the fore what was dealt with more implicitly or appeared to have been overlooked by the Committee.

## **11. Obligation to provide assistance following the immediate prior behaviour by a private party**

In *Szilvia Nyusti, Péter Takács and Tamás Fazekas v Hungary*,<sup>637</sup> the applicants complained that the ATMs of a specific bank, where they held accounts, were not adjusted to persons with visual impairments. They argued that it would not be enough if the bank retrofitted the ATMs in the proximity of their current homes; the whole network of ATMS operated by the bank throughout the country had to be amended. The State counter-argued that it acknowledged the applicants' situation and had taken steps into this direction, such as contacting the head of the bank and considering the preparation of a regulation to all financial institutions. However implementation would take time on account of the high costs. The case was examined through the prism of Article 9 (Accessibility) and a violation was found.

What is particularly interesting in this decision is that while the applicant's claim was essentially about access to the physical environment the case was mainly examined through the prism of the contractual relationship between the bank and the applicants and the scope of the State's duty to regulate it.

In particular, the discussion before the Committee focused on two issues: first, whether the positive obligation to ensure accessibility could arise within the context of private contractual relationships; and, second, the kind of action the State was expected to take to fulfil it. As regards the first question, the applicants complained about the failure of the State to intervene and impose on the bank an obligation of equal treatment. They argued that Hungarian law was ambiguous about the scope of the principle of equality, as that the domestic courts had been delivering conflicting interpretations in their case. As a result, they had been subjected to discriminatory treatment by not receiving the same services as other clients. The State avoided taking a confrontational position and tried to direct the discussion to a 'solution acceptable to all' instead. The Committee eventually solved the issue by relying on the text of the CRPD itself, which left little scope for a different interpretation; the positive obligation to ensure accessibility of electronic services also arose within the context of the interaction between a private enterprise and its clients:

“In the Committee’s view, the State party thus effectively takes a position that, under its existing

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<sup>637</sup> Supra fn.

legal framework, the obligation to provide for accessibility of information, communications and other services for persons with visual impairments on an equal basis with others does not apply to private entities, such as OTP, and does not affect contractual relationships. In this regard, the Committee recalls that under article 4, paragraph 1(e), of the Convention, States Parties undertake “to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”.

The Committee then moved on to examine the substance of the case. Citing Article 9 (“Accessibility”) the Committee underscored that States were required to ensure that electronic services are accessible to persons with disabilities, including by monitoring the implementation of minimum standards of accessibility of services provided to the public and by ensuring that private entities that offer this kind of facilities and services take into account all aspects of accessibility for persons with disabilities.

In assessing whether the positive obligation had been discharged, the Committee then listed the measures that the Hungarian State had taken. These included a telephone communication with the head of the bank and some first preparations for the issuance of a future regulation addressed to financial institutions.

“the State party has already identified three aspects to achieve this objective, namely (1) the accessibility of the ATMs and other banking services by all persons with disabilities; (2) the gradual achievability of such comprehensive accessibility due to costs involved; and (3) accessibility of the ATMs and other banking services provided by all financial institutions operating on the State party’s territory, and not only by OTP. The Committee also notes that the State Secretary for Social, Family and Youth Affairs of the Ministry of National Resources suggested to the President-CEO of OTP that OTP give priority in the future to the accessibility of newly procured ATMs, and that the latter had promised to retrofit the entire network of its ATMs within four years on a voluntary basis. Finally, the Committee notes that the State Secretary also requested the President of the Hungarian Financial Supervisory Authority to identify possible regulatory tools and incentives applicable to all financial institutions to ensure accessibility to their services for persons with disabilities, and that the latter had issued a recommendation “On the principles of consumer protection expected from financial institutions” (para. 6.4 above).

The Committee concluded, however, that these had proven insufficient to ensure accessibility to either the applicants or other persons in a similar situation:

“While giving due regard to the measures taken by the State party to enhance the accessibility of the ATMs operated by OTP and other financial institutions for persons with visual and other types of impairments, the Committee observes that none of these measures have ensured the

accessibility to the banking card services provided by the ATMs operated by OTP for the authors or other persons in a similar situation.”

A violation was thus found.

What the Committee did not address – or at least not explicitly – was the applicant's complaint that every time they wished to use the ATMs they had to rely on the assistance of others; a situation which the domestic courts did not consider as qualifying as “humiliating” and so as to be of legal relevance.<sup>638</sup> As we will argue below, the sense of dependence the applicants felt was intrinsically connected to the scope of the obligation, an issue that the Committee dealt with only indirectly.

In particular, in its analysis of the case, the Committee set out by essentially inquiring into a doctrinal question of much broader reach, namely the extension of human rights and State responsibility to the private sphere. The fact that positive obligations and State responsibility could also arise in the context of relations between private parties was nothing new to human rights law. As already mentioned in the course of Chapter III, mainstream human rights law acknowledged early on that the State's protective duty also entailed ensuring respect for human rights from interferences committed by private individuals.

The question the Committee had to answer in this case was whether the State's responsibility to ensure accessibility could extend as far as the free market context. The Committee did not deliberate for long. Relying on Article 4 CRPD (“General Obligations”), which was quite forthright, it declared that there was indeed such a positive obligation under Article 9, even in the context of contractual relations between a bank and its clients. What is worth noting, is that to reach this finding the Committee relied on Article 4 (“General Obligations”), in light of which Article 9 (“Accessibility”) was read. Article 4 holds that States ought to take measures to eliminate discrimination committed by “any person, organization or private enterprise”. In the specific case the applicants had, however, complained not on account of a harmful private action but a harmful inaction, namely the bank's passivity in retrofitting its ATMs. By concluding that the State's responsibility had been triggered and there was a positive obligation to intervene and regulate the relationship, the Committee essentially acknowledged that the enjoyment of the right required not only protection from interferences but also access to an enabling environment of a potentially particularly broad scope. This approach, a direct

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<sup>638</sup> Paras 2.1 and 2.13

consequence of its underlying vision of the human subject as socially embedded, lies in stark contrast to the much more modest formulations followed by mainstream human rights frameworks we will encounter in the next Chapter.<sup>639</sup>

Having established that Article 9 was applicable, the Committee went then on to examine the meaning and scope of the obligation within this context. The Committee held that Article 9 correlated to the positive obligation to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to, inter alia, information, communications and other services, including electronic services, by identifying and eliminating obstacles and barriers to accessibility.” To this purpose, “States Parties should, in particular, take appropriate measures to develop, promulgate and monitor the implementation of minimum standards and guidelines ... and ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities.”

The Committee did not then actually engage into a more detailed inquiry into the application of the obligation in the present case, probably because of the obviousness of the situation. Instead, it proceeded with assessing the State's performance. This, however, renders its analysis subject to different interpretations. At first reading one might gain the impression that the Committee defined the obligation to provide access on an equal basis solely in terms of the applicant's physical access to the ATMs. Such a reading would be supported by the definition of the obligation in terms of “removing obstacles and barriers” and the lack of any reference to the applicant's complaint about their sense of dependence on others.

From our standpoint, however, the Committee's approach offers also a different reading. In particular, Article 9 (“Accessibility”), which the Committee referred to, sets out by stating that the purpose of ensuring accessibility is “to enable persons with disabilities to live independently and participate fully in all aspects of life”. In light of this, the Committee's emphasis on ensuring accessibility on an equal basis with others ought to be understood as covering not only equality of resources but also equality of relationships. Accordingly, next to material access, the positive obligation to ensure accessibility comprises the possibility of exercising the right through participation in fostering relationships without losing one's sense of independence. In line with this reasoning, in the specific case the Committee's focus on the progressive adjustment of the ATMs could also be understood as an implicit acknowledgement that the only possible way to ensure the applicants' right without placing them in a situation of complete dependence was by

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<sup>639</sup> Compare in particular ECtHR, *Botta v. Italy*, Appl. No. 21439/93, Judgement of 24 February 1998

retrofitting the ATMs.

In reviewing the State's performance, the Committee then identified two benchmarks against which the State's actions would be assessed: first, measures to ensure accessibility to electronic services ("develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public"); and, second, the inclusion of the perspective of the affected parties within this process ("ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities"). If we relate the test the Committee applied to our framework, it relates to the adequacy of services, on the one hand, and the manner in which they would be delivered on the other.

To assess both, the Committee took into account that the State had extracted a personal promise that the bank would retrofit its ATMs within a four-year time-frame and had also undertaken some early work with the purpose of eventually issuing a recommendation to all financial institutions. These were considered insufficient and a violation was found. The Committee's recommendations to the State provide more information on what exactly was missing. As regards the inadequacy of the measures, the Committee appeared to attach particular significance to the vagueness of the program, the absence of concrete benchmarks and any legal commitment. The inclusion of the applicant's perspective, however, merits closer examination.

In particular, the facts of the case left little doubt that the applicants' needs were not considered. Not only were the ATMs inaccessible, but when the applicants had tried to complain to the bank, the bank had counter-suggested that they close their accounts instead. In addition, even while the case was pending before the Committee the bank had bought 300 new inaccessible ATMs. The action the State had taken to "ensure" the applicant's perspective was a phone call to the head of the bank and the planned issuance of a regulation in the future. The relationship between bank and applicant had effectively been left unregulated.

In the Committee's final recommendations we can see what would have been required for the fulfilment of the positive obligation. The Committee asked the Hungarian State, amongst others, "to create a legislative framework with concrete, enforceable and time-bound benchmarks" for the gradual adjustment of banking services by private financial institutions and to ensure that the "legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others." In



essence, what the Committee suggested was an intervention at a structural level, to ensure not only physical accessibility but also the participation of persons with disabilities within the public dialogue, which until then had been dominated by the private institute. In other words, the Hungarian State ought to have ensured not only some minimum standards of the services provided to the applicants but also safeguarded the applicants' involvement when these were laid down. In doing so, the solution suggested by the Committee indirectly acknowledged that the relationship had to be constructive towards both parties.

If we now wrap up the judgment, then the analysis followed by the Committee could be summarised as follows. Relying on the text of the Convention, the Committee first established that the right of access to electronic services entailed the positive obligation to ensure respect for the right in the context of contractual relationships between a private bank and its clients. In explaining the meaning and scope of the obligation, the Committee referred to Article 9 and the need to ensure accessibility on an equal basis with others. In the absence of a more detailed analysis, it is open to debate whether the Committee meant equality in terms of material resources or equality also in terms of relationships – as we are arguing – implicitly acknowledging that the ATMs were the only means to achieve this. To assess the fulfilment of the obligation, the Committee then held that the positive obligation entailed the adoption of a two-fold course of action: first, ensure the immediate or progressive adjustment of the ATMs and second, ensure that the clients' views were represented within this process. In this case, it concluded that the obligation had not been discharged along either line of considerations.

If we now reframe the Committee's reasoning on the basis of our framework, the analysis would have been structured as follows. The right to accessibility to electronic services correlates to the positive obligation of ensuring that private institutions, in this case a bank, render their services accessible so as to enable persons with disabilities to live independently and participate fully in all aspects of life. To fulfil its obligation it is not enough for the State to monitor and develop the accessibility of these services by the providers. It must also ensure that all aspects of accessibility for persons with disabilities are taken into account within this process.

In the present case, to fulfil its obligation the State had extracted a promise by the bank to retrofit its ATMs and had contemplated the future issuance of a regulation addressed at financial institutes. While the adjustment of the ATMs would have ensured the social and material adequacy of the measures undertaken, since it would have allowed the applicants to exercise their right without entering into a situation of extreme dependence on others, in the present

case the adequacy threshold had not been met. The plan came with no legal commitment and was too vague. In addition, the process through which the State had sought to fulfil its obligation, namely through an informal communication with the head of the bank, had failed to generate a fostering relationship between applicants and State consistent with the requirements of agency, dignity and participation. It had left the relationship between bank and clients unregulated effectively excluding the applicants as participants within the decision-making process. What was needed in this case was a structural intervention to ensure a democratic solution which equally represented the applicants' views vis-à-vis the State, which until then had been monopolised by the bank.

In this case, our framework would not substantially alter the outcome. However, it would offer a more comprehensive and transparent basis for analysis, reducing the occurrence of ambiguities and implicit acknowledgments as well as reducing the risk of overlooking parts of the complaint.

## **12. Calls for assistance in the absence of an immediate prior behaviour**

In *Liliane Gröninger et al. v. Germany*<sup>640</sup> the subject matter was access to the labour market and Germany's failure to facilitate the applicant's integration to the labour market. While social legislation was in place foreseeing an integration subsidy and an Employment Agency had been set up, these had proven ineffective. In the applicant's view, the law was discriminatory on the basis of disability and the Agency had offered little assistance in practice. In its turn, the State blamed the applicant for lack of co-operation. Eventually a violation was found on the basis of Article 27 (Right to Work) read together with Article 3 (General Principles), Article 4 (General Obligations) and Article 5 (Equality and Non-Discrimination).

The Committee solved the dispute in light of the positive obligation to effectively promote the employment of persons with disabilities. It identified two different issues arising from the applicant's complaints: first, whether Germany's integration subsidy scheme was in compliance with that obligation; and, second, whether the actual assistance Germany offered to the applicant had led to a further violation of that same obligation. Eventually a violation was found on both grounds.

As regards the first issue, a series of arguments were raised by both parties as to whether the

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<sup>640</sup> Supra fn. ,

German subsidy scheme system was in compliance with Germany's commitments under the CRPD. For the applicant it was not. First, the law was discriminatory because the integration subsidy was only open to disabled persons whose full working capacity – unlike his – could be restored within 36 months. Second, in any case the law did not create any rights for persons with disabilities because it was not them but their employers who had the right to claim the grant. Finally, third, the release of the grant was on the discretion of the Employment Agency. For the German State, the grant was open to anybody who met the requirements of the law.

The Committee set out by examining the legal conditions and the rather complex procedure foreseen for the release of the grant. To receive the grant, the applicant would have to find an employer willing to hire him and apply for a subsidy before the Employment Agency. The approval of the application as well as the precise sum and duration of the subsidy, set at a maximum length of 60 months, were decided by the Agency, without any opportunity for the applicant to influence the decision.<sup>641</sup>

The Committee's first finding was that the overall setup of the scheme was in violation of the Preamble and Article 3 (General Principles) of the Convention. In the Committee's view it reflected the misconception that disability was a temporary situation that could eventually be cured:

“The Committee observes, however, that the said scheme in practice requires employers to go through an additional application process, the duration and the outcome of which are not certain, and that the disabled person has no possibility to take part in the process. The policy seems to respond to the medical model of disability, because it tends to consider disability as something that is transitional and that, in consequence, can be “surpassed or cured” with time. The policy is not consistent with the general principles set forth in article 3 of the Convention, read together with paragraphs (i) and (j) of the preamble.”

Then addressing the rest of the applicant's complaints, the Committee noted that even though the intention of the scheme was to increase the employment opportunities of persons with disabilities, in practice it had the opposite effect.

The right to employment opportunity under Article 27 CRPD, the Committee explained, entailed an “implicit” obligation to create a facilitative environment so as to promote employment:

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<sup>641</sup> The legal conditions appear to be that an employer should make a binding employment offer to the author's son and apply for the integration subsidy, after which the employment agency shall evaluate the situation and take a decision on the duration and amount of the integration subsidy to be allocated. In any case, according to the State party's submission, the subsidy would amount to a maximum of 70 per cent of the wages, for a maximum period of 60 months

“The Committee notes that article 27 of the Convention *implies* an obligation on the part of States parties to create an enabling and conducive environment for employment, including in the private sector. The Committee further observes that article 4, paragraph 1 (a), of the Convention imposes on the State party the general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention related to work and employment. It also observes that article 3 establishes that in its legislation, policies and practice the State party should be guided by respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; and equality of opportunity.”

In this case, however, the complexity of the bureaucracy involved and its uncertain outcome effectively discouraged employers from hiring persons with disabilities. They thereby placed the applicant in an adverse position, unwittingly opening, the door to indirect discrimination”

“In the instant case, the Committee is of the view that the existing model for the provision of integration subsidies does not effectively promote the employment of persons with disabilities. The Committee finds in particular that the apparent difficulties faced by potential employers when trying to gain access to the integration subsidy that they are entitled to for the employment of a person with disabilities affect the effectiveness of the integration subsidies scheme. The already mentioned administrative complexities put applicants in a disadvantageous position and may in turn result in indirect discrimination. The Committee therefore considers that the integration subsidies scheme, as applied in the case of the author’s son, is not in accordance with the State party’s obligations under article 27, paragraph 1 (h), read together with article 3 (a), (b), (c) and (e), article 4, paragraph 1 (a) and article 5, paragraph 1, of the Convention.”

At this stage, it is useful to take a pause and review the Committee's analysis before proceeding to the second basis on which a separate violation was found. What is particularly interesting in this first section of the judgment is how the Committee alternates its legal bases to articulate all complaints when, as we are going to argue, our framework would have been able to capture all. In this first part, the Committee essentially identified two major problems with German law: first, that its approach towards disability did not comply with the CRPD definition of disability; and, second, that it did not create a conducive and enabling environment to effectively promote the employment of persons with disabilities. In this case, the Committee did not set out by explaining the scope of the obligation. Instead, to address the first complaint, the Committee invoked the Preamble and the General Principles – in a way as a side-observation half-way

through its analysis. To capture the second complaint, it read an “implicit” obligation into Article 27 read together with the General Principles and Obligations of the Convention. As we are going to argue, both could have been dealt with in a unified manner under the positive obligation to promote employment.

As regards the Committee's first criticism, namely that German law treated disability as a curable condition, it is not as clear from the Committee's analysis what exactly this related to. The applicant had narrowed his complaint to the temporal limitations attached to the scheme (i.e. that the recipient's functionality could be restored within 36 months). In the Committee's reasoning, however, we find additional considerations leading to this finding, namely that “the duration and the outcome of which are not certain, and that the disabled person has no possibility to take part in the process.” It seems that what pre-occupied the Committee was not the temporal limitation as such, but the overall approach towards the subsidy as an *ad hoc* ephemeral solution rather than a structural solution which the recipient could count on to build his/her life. This reading is supported if, in light of our discussion of the self, we review the Commission's concern that “[t]he policy seems to respond to the medical model of disability, because it tends to consider disability as something that is transitional and that, in consequence, can be 'surpassed or cured with time.'

The vision of the subject underpinning German law, which the Committee criticises, was that of a self-sufficient rights-holder who was only temporarily in need of State assistance. The CRPD notion of selfhood, however, treats dependence on external assistance as a permanent feature of human nature. In other words, the disparity lay in the degree of dependence on external material assistance. While the Committee invoked the Preamble and definition of disability as a legal basis to capture this disparity, from our standpoint the right legal basis to address this concern would have been the positive obligation itself under Article 27. What the Committee was truly addressing here was the material adequacy of the obligation to promote employment, namely to provide access to a minimum threshold of material welfare. The provision of the grant was materially inadequate because the conditions attached to it did not render it a structural solution but a temporary measure with unreliable results.

To then capture the other major problem of the law, namely its discouraging effect on private employers, the Committee used as a legal basis an 'implicit obligation' in Article 27 “to create a conducive environment, including in the private sector.” It is likely that the Committee resorted to this because there was no explicit provision to cover the role of the social environment, as

was the case in the previous judgments we examined in this Chapter (i.e. a clause about participation in all aspects of life and independence). If we take into account that it was eventually the “obligation to promote employment” which was violated, it is reasonable to argue that what the Committee was actually examining here was not the obligation to create a fostering environment as a free-standing duty, but as a component of the more generic obligation to promote employment. The other component of that obligation was the necessary material assistance, which it had examined immediately before. In assessing whether the environment was enabling and conducive, the Committee focused on the relationship between the employer and the applicant. It noted that in order to get access to the grant, the applicant had first to get an offer of employment and, second, wholly rely on the employer to lodge the subsidy application. In other words, to access the subsidy, and hence the right, the applicant had to enter into a relationship of complete dependence on another person. The Committee also noted, however, that the scheme was in fact so complex bureaucratically that it “puts applicants in a disadvantageous position and may in turn result in indirect discrimination”.

On our reading, what the Committee essentially meant was that the State had laid down conditions that risked segregating the applicant from the labour market; in other words, making it *de facto* impossible to establish relationships with an employer in the first place. If we relate this part of the Committee's analysis to our framework then this would relate to the social inadequacy of the obligation, namely to allow the enjoyment of the right through fostering relationships without placing the rights-holder in a position of dependence.

Throughout this first part of the judgement, the Committee also implicitly dealt with what was the applicant's third complaint, namely the inability to participate in the Agency's decision-making process when releasing the fund. In reviewing both law and the bureaucracy it noted that the applicant had no possibility to apply for the fund himself and that he had no way to influence or control the Agency's decision. From our standpoint, both considerations related to the quality of the interaction between the applicant and the authorities involved in the release of the grant. The applicant was *de facto* denied his standing as a competent agent and was excluded from the decision-making process. In our scheme these two arguments would be examined separately, as part of the relationship with the authorities through which the grant was released.

If we look now at the judgment in its entirety, then what the Committee is essentially doing in its analysis is breaking down the positive obligation to promote employment into a material

dimension, namely the provision of grant and other subsidies, and a relational dimension, namely the relationship with the employer. It then assesses State performance on the basis not only of the material and social adequacy of the subsidy provided, but also the interaction with the Employment Agency. However, to examine all this it twice changes its legal basis within the judgment, invoking first the Preamble and the social model, then the implicit obligation of Article 27, and eventually finds a violation of Article 27 read together with all the above.

If we now apply our framework to solve the dispute, we would not alter in any substantial manner the Committee's analysis, but would rather systematise and unify what is already there. In particular, we could argue the following.

The right to employment under Article 27 CRPD entails the positive obligation to promote the employment of persons with disabilities through policies and measures which may include incentives and grants as well as through a conducive and enabling environment which would allow the person to exercise the right without entering into relationships of total dependence. To fulfil its obligation the State would have to demonstrate not only the material and social adequacy of the services provided but also that these were provided through a fostering relationship to the State which meets the quality standards of agency, dignity and participation. In the specific case, to fulfil its obligation the State had established a subsidy aimed at assisting persons with disabilities integrate into the labour market. The scheme was, however, materially and socially inadequate. First, the restrictive conditions attached to it meant it did not offer a reliable solution. The outcome, duration and height of the grant was decided on an *ad hoc* basis without the applicant being able to influence the decision. A second inadequacy lay in the fact that the procedure to release the grant placed the applicant into a situation of complete dependence on potential employers, as only they were entitled to make the application for the grant. The conditions did not only fail to create a conducive environment, however, but were so discouraging that they risked impairing the mere possibility to form relationships with potential employers in the first place.

Next to its material and social inadequacies, the specific service was provided through a relationship to the State that did not meet the necessary quality standards. The applicant was *de facto* not acknowledged as a competent agent since the decision to apply for the grant before the Employment Agency lied with the employer and not the applicant. In addition, the applicant had no input in the decision-making process. As a result, the obligation had been violated.

The second part of the Committee's decision dealt with the assistance the State had offered to

the applicant. The applicant complained that the measures the authorities had taken in his case had been ineffective. In addition, the condescending attitude of the Employment Agency had discouraged rather than assisted his integration in the labour market. In the government's view the applicant was entitled to a series of tools provided by the social legislation that he had not made effective use of and had, overall, been un-cooperative.

In reviewing the arguments through the lens of Article 27 (Employment), the Committee noted that there was a positive obligation upon States to assist the integration of persons with disabilities in the labour market, including measures to provide access to placement services as well as offer active assistance in finding employment:

“The Committee observes that article 27, paragraph 1 (d) and (e), of the Convention enshrines the rights to benefit from appropriate measures of promotion of employment opportunities, such as to have effective access to general placement services as well as assistance in finding and obtaining employment.”

The Committee noted that most of the government's assertions were relatively vague and only a few measures had actually been applied by the Employment Agency, which were the following:

“...granting unemployment benefits for unspecified periods of time; holding counselling meetings and controlling whether the author's son remained in the geographic area to which he was assigned and whether he regularly appeared for meetings. The authorities also provided the author's son with job vacancies, some of which were outdated, and included him in a “holistic placement measure” to which he was assigned by the Brühl Employment Agency and which appears to have been discontinued by the Bonn Employment Agency.”

In concluding that the measures were few compared to what was theoretically available, the Committee criticised the German State for its apparent disapproval of the applicant's own efforts to improve his situation:

“The Committee lastly observes that the range of measures applied to the case of the author's son was limited compared to the extensive list of available measures described by the State party. The Committee further observes that the State party appears to hold the opinion that the efforts of the author's son to increase his qualifications through further education and the fact that he had at times taken part-time employment constitute a hindrance to the efforts of the employment agencies to assist him.”



In view of all this the Committee concluded that the “standards” of the obligation to assist the integration of the applicant into the labour had not been met and a violation of Article 27 read together with Article 3 and Article 4 (General Principles and General Obligations) of the Convention was found.

In this section of the judgment the Committee, citing the CRPD, set out by acknowledging that there was a positive obligation under Article 27 (Employment) to aid the applicant's integration in the labour market. Similar to the previous section, the Committee did not define the scope of the obligation, but proceeded to the stage of the fulfilment. It noted that this obligation required a two-course action by the State: first, to provide “access to general placement services” and, second, to offer “assistance in finding and obtaining employment.”

The part that was left out was the applicant's complaint that due to the State's lack of assistance he was completely dependent on his family to help him integrate in the labour market. Even though as a disabled person he was at a clear disadvantage, the Employment Agency had refused to finance any of his efforts to improve his qualifications and had refused to provide training or financial assistance for any of the programmes of his choice. As a result, all costs for his vocational training and training program were borne exclusively by his family. If we relate his complaint to our framework, the applicant was essentially arguing that the State's inaction had placed him in a situation of complete dependence on the care of his family. As for the burdens this had placed on the applicant's family, at the time of the Committee's deliberation domestic proceedings were still pending.

Going back to the Committee's analysis, in reviewing whether the State had fulfilled its obligation the Committee took account of a series of measures which we may categorise as: a) material services to help the applicant; and, b) consultative assistance. The first list consisted of “granting unemployment benefits for unspecified periods of time” and offering the applicant a “holistic placement measure”. The second list consisted of “holding counselling meetings”, “controlling” the applicant's geographic whereabouts and his regular attendance of meetings, informing about “job vacancies many of which were outdated” and unilaterally discontinuing the placement scheme after the Agency learned the applicant had found part-time employment. The Committee concluded that these measures had not met the standards of Article 27, as he measures were “limited compared to the extensive list of available measures described by the State party”. The Committee also criticised the State for treating the applicant's own efforts to improve his situation as a “hindrance to the efforts of the employment agencies to assist him”.

The Committee's disapproval is also discernible in the language used to describe the consultative role of the Agency offered, such as “controlling” the applicant's whereabouts and sending “outdated” vacancies”.

If we now compare the Committee's analysis to our own framework, then the two kinds of assistance foreseen (measures of material assistance and consultative support) correlate to the two benchmarks against which we suggest assessing the fulfilment of the obligation: the adequacy of the goods and services provided (placement scheme and benefits) and the quality of the interaction between State and recipient. As regards the latter, the consultative support shifts the focus onto the quality of the interaction between citizen and responsible authorities. The State is expected to be in a dialectic relationship with the applicant and offer guidance and support throughout this process of gaining access to employment. In our schema, to fulfil this part of the obligation, the standards of dignity, agency and participation must be met. From our reading, the Committee's overall appraisal is consistent with this scheme.

In particular, as regards the adequacy aspect, the Committee noted that the State had taken some action (benefits, placement scheme) but that these were “limited” compared to what was theoretically available. We may read therefrom some disapproval or an inconclusive finding, as if Germany's measures were more of a borderline case; the State had not flagrantly violated this aspect of the obligation but had also not necessarily done enough.

As regards the consultative assistance provided to the applicant, this was clearly problematic and more had to be said about it. There were several reasons why the Committee was dissatisfied: the “controlling” attitude of the Agency, the apparent lack of interest and belief in the applicant's capabilities by sending him “outdated” vacancies, the decision to discontinue the scheme without consulting the applicant and the obvious disapproval of the applicant's own efforts to obtain employment. From our reading, what seemed to dissatisfy the Committee most was not the quality of the advice as such, but rather the attitude of the Agency towards the applicant and its disempowering effect on the applicant's self-perception. In our scheme, all three standards — dignity, agency and participation — would not have been met. This reading is also consistent with the applicant's complaint that “it is humiliating when a person with a disability and his family are told at each meeting that he will never find work and that he has no right of participation”, and that “if those governing do not truly believe it possible... discrimination does not end with appointment.” The categorical tone of the Committee compared to its earlier more ambivalent tone when appraising the material adequacy of the

State behaviour makes us think that it was mainly this poor quality of the interaction that weighed heavily in the finding of the violation.

If we now reframe the Committee's analysis relying on our own suggested framework then the narrative would look as follows. The right to employment opportunity correlates to the positive obligation to assist integration in the labour market. This entails providing measures to facilitate access to the labour market, including subsidies and training programs, while at the same time ensuring that the applicant will not have to enter relationships of total dependence in this process. In addition, to fulfil its obligation the State will have to demonstrate not only the material and social adequacy of the services provided but also the fostering character of the relationship to the authorities through which these were provided (agency, dignity and participation).

In the specific case, to fulfil its obligation the State had set up a placement scheme, a benefits system and an Employment Agency to aid the applicant gain qualifications and find employment opportunities. However, in practice these had proven inadequate because they had failed to ensure that the applicant would have been able to access the right without entering into relationships of extreme dependence, in this case on his parents. In addition, the manner in which they were provided did not meet any of the three standards of agency, dignity and participation. The Agency did not treat the applicant as a competent agent as it refused to consider his wishes and declined to support any of the training programmes he had chosen to pursue . It also instilled insecurity and fear in the applicant by controlling his geographic whereabouts as a condition of continued support. In addition, the applicant was excluded as a participant in the decision-making process, while on one occasion the Agency unilaterally interrupted his placement scheme without consulting him. Because of the Agency's dismissive and condescending attitude the applicant also felt humiliated. As a result, the obligation was violated.

Similar to the previous cases, our framework would not actually alter the Committee's decision, but rather reframe in a more systematic and consistent manner what is already there and minimise the risk of overlooking steps within the analysis or complaints.

### **13. The CRPD's paradigm shift in human rights law**

We have thus far made the argument that in addition to our mainstream individualistic

approach towards positive obligations, it is also possible to analyse positive obligations by means of a relational analysis. To this purpose we suggested an alternative analytical framework, the validity and applicability of which we tested in the example of a thematic human rights treaty embedded in a relational conception of the self, the CRPD. Before moving to the next step of inquiring into the applicability and practical implications of such a relational analysis for human rights law in general, we ought to address a possible question concerning the validity of such an extension at the normative level. In other words, to what extent is such an extension desirable and to what extent a relational analysis of positive obligations ought to be treated as a disabilities-specific model of positive obligations. The answer to both questions in essence complements the argument that we started developing in the course of Chapter II, about the evolution of our underlying human rights subject. We are addressing it here, however, as this extension has been mostly discussed within the disability human rights scholarships. It is also here that we find some of the most compelling arguments in favour of such an extension.

In particular, in the course of Chapter II we argued that at a philosophical level there is a clear and discernible trend within human rights law to move away from individualistic conceptions of selfhood towards more relational ones. This shift is reflected in a growing number of thematic treaties, the primary aim of which has been to complement the individualistic subject of mainstream human rights law with human dependencies – a process that the CRPD has epitomised. We took the position that instead of creating more exceptions around a narrowly conceived subject, we should start with a more embracing metaphor to begin with, namely that of the relational subject. To this extent we also differentiated our position from calls for a more embracing metaphor that are, however, thematically limited or favour a vulnerability approach.

The first question we will deal with here to complement our argument is whether such a holistic expansion risks harming rather than enhancing the protection of marginalised groups. One possible objection could be that such unification at the doctrinal level might eventually diminish the special attention paid to the beneficiaries of thematic treaties. A compelling answer to this has been provided by disability human rights scholars seeking to rectify the marginalisation of persons with disabilities from mainstream human rights law.

Long before the adoption of the CRPD, disability rights scholars had insisted that the effective protection of the rights of persons with disabilities does not necessarily require a separate disability-specific framework of rights. Much weight was thereby attached to the potentially negative impact of the disability identity on one's self-perception, as not all persons with an

impairment can or wish to identify with it.<sup>642</sup> The argument was that if we make the kind of support a person receives dependent on an unwanted identity, we might eventually cause more harm than good. Nurturing the sense of being different than others eventually perpetuates the dividing line between disabled and non-disabled. What was asked for, instead, was a shared account of rights. And for this we ought to re-define what we consider mainstream and normal, acknowledge “the value of subjectivity” and allow “the personal experience of oppression to bear on analysis and interpretation of the world” so that everybody can be fully integrated into “a shared social life”.<sup>643</sup> “Ultimately”, Wendel wrote back in 1989, “we might eliminate the category of ‘the disabled’ altogether, and simply talk about individuals’ physical abilities in their social context.”<sup>644</sup> Transforming our mainstream human rights framework in a manner that integrates the perspective of marginalised groups and re-defines the enjoyment of human rights in a manner that would apply to us all is, from the perspective of the marginalised, a *desideratum* to achieve better human rights protection.

The next question is, then, whether a transformation like the one we defended here and also envisioned by the CRPD is normatively feasible; namely, whether we can convincingly integrate a relational conceptualisation and analysis of positive obligations within our mainstream human rights framework without invalidating the credibility of our human rights narrative or denying the truth of disability. A cogent narrative supporting such integration again comes from disability scholarship. In an insightful contribution<sup>645</sup> drawing on her experience of treating persons with chronic disabilities, Ells advances the position that the experience of the self in conditions of disability reveals a universal truth about human interconnections and interdependencies. The experience of disabilities, she argues, reveals relationships of dependency between one's self with the body, others and the structures of the world, which apply to us all.

In Ells' view, humans tend to view the body as an integral part of one's identity. Under conditions of disability, the human self is perceived in a necessarily embodied and social context. We are, however, often under the illusion that these aspects do not concern 'us' and associate interdependence and interconnectedness with the disability identity. The truth, however is that all humans are embodied, interconnected and interdependent. From the experience of

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<sup>642</sup> N. Watson, “Well, I know this is going to sound very strange to you, but I don't see myself as a disabled person: identity and disability”, *Disability and Society*, Vol. 17, Issue 5, 2002, pp.509-527

<sup>643</sup> S. Wendel, p. 108

<sup>644</sup> 29, No 4, 2009, pp.

<sup>645</sup> C. Ells, “Lessons about Autonomy from the Experience of Disabilities”, *Social Theory and Practice*, October 2001, Vol. 27: 4, pp. 599- 615

disability, she explains, a distinction is made between body and self because all activities must be pre-arranged around one's human condition. We also associate disability with dependence because persons with disabilities frequently need assistance with the activities of daily life, where we are typically independent. Likewise, we associate interdependence with the disability identity because persons with disabilities often need to relinquish control over their lives to those who help them. Thinking that this embodied perspective does not relate to us, is an illusion that we only become aware of when we fall sick or something is wrong with our bodies.<sup>646</sup>

Dependence is also universal; we may be independent with respect to some tasks but are dependent with respect to others. Likewise, because of our privileged position of having developed in an environment of goods but also respect, we forget that our most basic provisions, such as water, electricity and even affection, would not be readily available to us without the existence of external arrangements and the interventions of others. The truth thus is that we are all interdependent and interconnected, and disability merely makes apparent the degree of our dependencies and relatedness to others.<sup>647</sup> Because of the tremendous practical implications of the way we understand autonomy, however, we ought to look critically at the theories of autonomy operating within each context and integrate the disability experience within a new comprehensive conception of autonomy.

Ells' disabilities analysis of autonomy shares much with relational theories of the self, something she herself acknowledges in her conclusion hoping for a further abridgment. Her claim that interdependence and relatedness define autonomy from the experience of disabilities provides support to our claim that the most basic features of the CRPD person are dependence and interdependence, and that this conceptualisation of the subject is very congruent to the relational perception of the self. What is most important for the purposes of the present thesis, however, is her normative claim that the elements that constitute human autonomy from a disabilities perspective (dependence-relatedness) ought to be treated as real and universal components of the human condition. What we can now add to our human rights account is that integrating dependencies and interdependencies within our mainstream metaphor, and grounding human rights law within a mainstream relational metaphor is not optional. In fact it is normatively required because these are universal features of the human condition that have always been there to begin with.

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<sup>646</sup> C. Ells, p. 602

<sup>647</sup> C. Ells, pp 602-603

Within the human rights doctrine, the position defended here finds support among those disability human rights scholars who argue that the innovations that the CRPD has brought are so far-reaching that they cannot be accommodated within our current human rights doctrine. According to those views, a new language is needed to capture these changes and to refresh our human rights thinking. Within this discourse, the concept of legal personhood has attracted most scholarly attention. The main line of argumentation suggests that legal capacity is the most important concept within the CRPD and holds the key to unlock all other rights. The approach of the CRPD is so path-breaking, however, that it challenges everything we knew about human personhood. The norms of “universal legal personhood” and “supported decision-making” that the CRPD endorses wholly counter all traditional approaches towards legal personhood, such as status, outcome or functional abilities.<sup>648</sup> We therefore need a new framework capable of better capturing the idea of autonomy within a context of dependency that our current human rights language has difficulty explaining.

In the search for a new doctrinal justification, some studies have turned their attention towards feminist scholarship, in particular, Nussbaum's account of social justice and Kittay's care ethics approach. On this basis they then seek to elicit more practical guidelines on how to construct supported decision-making systems, for instance within national law.<sup>649</sup>

This strand of discussion relates to the position taken here for two reasons. First, because there is consensus that the CRPD has brought a broad doctrinal 'shift' within human rights, which encompasses a whole spectrum of innovations in the ways we analyse rights. Second, even though the language of 'relational selfhood' is not actually used in many of these accounts, in their search for alternative frameworks scholars have shifted their focus to accounts that are actually built around feminist interpretations of the self. Third, because some accounts also argue that the shift of the CRPD is not disabilities-specific but beneficial for or applicable to all human rights.

Of particular influence has been the work of Quinn. In a series of contributions he has advanced the position that the key innovation of the CRPD from which all others flow is its very holistic conception of personhood; a conception, he argues, that dispels our myth of the 'rational,

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<sup>648</sup> C. O'Mahony, Legal capacity and detention: implications of the UN disability convention for the inspection standards of human rights monitoring bodies, *The International Journal of Human Rights*, Vol.16 No 6, 2012, pp. 883-901;

<sup>649</sup> See eg. Arstein-Kerslake (2014): *An empowering dependency: exploring support for the exercise of legal capacity*, *Scandinavian Journal of Disability Research*; A.Dhanda, "Constructing a new Human Rights lexicon: Convention on the Rights of Persons with Disabilities", *Sur International Journal on Human Rights*, Vol. 8, 2008, available at [http://www.surjournal.org/eng/conteudos/getArtigo8.php?artigo=8,artigo\\_dhanda.htm](http://www.surjournal.org/eng/conteudos/getArtigo8.php?artigo=8,artigo_dhanda.htm)

masterless man'.<sup>650</sup> While Quinn does not refer to relational theories, seeming to draw more from theories of social justice theories and even cognitive science, his position relates very well to the present discussion.

Quinn's starting point is that "the whole point of our political and legal order, is to create an uncoerced space for the self, for the masterless man." This myth of the "rational, masterless man" — that had historically led to the 'civil death' of groups of people also beyond those with disabilities — is, however, not sustained by how humans really are<sup>651</sup> because the human condition is much more complex. "In reality, we do not treat cognition as the essence of personhood", or at least not to the extent that moral philosophers do, "in reality, we all depend on others for our sense of self", "in reality, we all assume social capital to provide the innumerable supports without which we could not function."<sup>652</sup> The "revolution" of the CRPD, Quinn argues, is that it abandons this myth, it leaves behind rationality and advances a deeper conception of personhood and flourishing that better chimes with reality. It acknowledges that we are not all 'masterless men' but that we also have dreams, that we rely on "myriads of supports to forge our own pathways", and that our personhood is shared; "we are all both a

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<sup>650</sup> The account presented here is based on a series of presentations by Quinn on the issue of legal personhood under Article 12:: "Rethinking Personhood: New Directions in Legal Capacity Law & Policy", presented at University of British Columbia, Vancouver, 29 April 2011; "Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD", presented at Harvard, Harvard Project on Disability, 20 February 2010; Seminar on Legal Capacity," Brussels: European Foundation Centre, Consortium on Human Rights and Disability, 4 June 2009; see also Quinn and A Arstein-Kershake, "Restoring the human in human rights", *The Cambridge Companion to Human Rights Law*, C. Gearthly and C. Douzinas (eds), CUP 2012

<sup>651</sup> See also A. Damasio, *Self comes to Mind: Constructing the Conscious Brain*, Knopf Doubleday publ., 2010 to whose work Quinn refers. Damasio's work in many respects actually provides precious scientific support to relational legal theorists: "There is indeed a self, but it is a process, not a thing, and the process is present at all times when we are presumed to be conscious. [...] Most species whose brains generate a self do so at core level. Humans have both core self and autobiographical self.. The protoself with its primordial feelings, and the core self, constitute a "material me." The autobiographical self, whose higher reaches embrace all aspects of one's social persona, constitute a "social me" and a "spiritual me." .. normal human consciousness corresponds to a mind process in which all of these self levels operate ... [...] Throughout the evolution of mammals, especially primates, minds become ever more complex, memory and reasoning expanding notably, and the self processes enlarge their scope. The core self remains, but it is gradually surrounded by an autobiographical self, whose neural and mental natures are very different from those of the core self.; see also Chapter 5 on how Damasio argues that emotions form an integral part of the construction of the self "In the quest to understand human behavior, many have tried to overlook emotion, but to no avail. Behavior and mind, conscious and not, and the brain that generates them, refuse to yield their secrets unless emotion (and the many phenomena that hide under its name) is factored in and given its due. I will address the neural mechanisms behind the construction of the self, I will often invoke the phenomena of emotion and feeling because their machinery is used in the building of the self.

<sup>652</sup> G. Quinn, An Ideas Paper, "Rethinking Personhood: New Directions in Legal Capacity Law & Policy" or "How to Put the 'Shift' back into 'Paradigm Shift'", presented at University of British Columbia, Vancouver, Canada, 29 April 2011, pp. 14-15; See also G. Quinn, 'Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD', HPOD Conference, 20 February 2010



support and threat to each other and almost always at the same time.” The CRPD is, in his view, less about disabilities and more about the human condition. It “does not so much bring out something that is peculiar to disability as it makes plain something that applies to all humanity.”<sup>653</sup> The doctrinal innovations of the Convention, he concludes, are actually the result of a deep revolution in our approach towards selfhood that applies to us all and can and should be exported to all human rights treaties.<sup>654</sup>

Although his approach is embedded in a different theoretical context, Quinn's conclusion is consistent with the position we are defending here: that once we abandon our underpinning individualistic self and acknowledge dependence and interdependence as part of the human condition then we explain the doctrinal innovations of the CRPD; and since this approach to personhood relates to us all we can and ought to apply the doctrinal innovations of the CRPD across human rights law. Where we differentiate, however, is that what he describes as a “revolution,” is from our standpoint an evolution that has been taking place within human rights law a long time. A proliferating number of thematic treaties have been trying to tell us the same truth about human nature that the CRPD, the latest in line, most clearly articulates.

## 14. Conclusion

To tie the argument up, the purpose of the present Chapter was to juxtapose to the mainstream individualistic framework a relational analysis of positive obligations which would build a social component into the concept. To this purpose, the first part of the Chapter returned to the philosophical discussion of the self, focusing on the kind of analytical and conceptual tools we could extract from those theories. Relying mainly on the early work of Nedelsky, we made a broad analytical distinction between the relationships the rights-holder forms with the State and those a person forms with private parties. We argued that when legal theorists apply relational autonomy in the context of the former set of relationships, they appear to bring together three conceptual frameworks to structure the optimal social setting: dignity, agency and participation. To analyse the latter, on the other hand, a variety of parameters are taken into account not all of

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<sup>653</sup> Ibid.

<sup>654</sup> G. Quinn and A Arstein-Kershake, “Restoring the human in human rights”, *The Cambridge Companion to Human Rights Law*, C. Gearth and C. Douzinas (eds), CUP 2012, p. 38

which can be aptly articulated by means of the law. We nonetheless discerned the following basic common principles to describe the role of the law a) to make the establishment of relationships possible in the first place; and, b) to allow a person enter into relationships without being in a situation of total dependence and without imposing such a situation on the person offering the care.

With the help of these main conceptual tools the Chapter suggested a new understanding of positive obligations which was constructed as follows. To fully enjoy human rights, a person ought to have access to a minimum threshold of material and social welfare. Positive obligations, however, acknowledge that humans are unequally situated not only in terms of goods but also in terms of relationships, and the State thus has to step in when access to this minimum threshold is jeopardised. There are three circumstances in which the State's protective duty is triggered: when, due to a prior action by the State, the individual is structurally unable to access either minimum threshold of sociability and material welfare; when due to a prior behaviour by a private party the individual's access to this threshold is impaired; when in the absence of either, the individual is nonetheless unable to access this threshold. In all three cases the State must ensure as a minimum that the individual is not only able to access some basic resources, but also that in doing so he/she does not have to enter into private relationships of extreme dependence. In addition, a relational analysis acknowledges that every time the State steps in as a guarantor, it enters into a relationship with the individual. To fulfil its obligation it is not, therefore, sufficient to offer adequate services and goods but also ensure that these are provided through an interaction with the assigned bodies that meet the requirements of dignity, agency and participation. We then tested the validity and applicability of our approach in human rights law by using as an example the CRPD framework, with the understanding that it reflects a relational perception of the self.

After analysing the main characteristics of the CRPD person to verify our position, we explored the construction of positive obligations under the CRPD. We argued that these have a dual structure: a material and a relational side that correspond to our relational framework. To explore the applicability and added value of our framework in practice, we then analysed the case-law of the CRPD Committee in light of our model. After identifying the analogies with our framework we reframed the Committee's judgment with the aid of our suggested tools. We argued that while there was no substantial change in the outcome of each judgment, the added value of our framework lied in systematising the Committee's case-law and in offering a more

comprehensive and consistent approach that was less likely to overlook some aspects of the dispute and create ambiguities. We concluded our Chapter by arguing that a relational analysis to positive obligations is not disabilities-specific because the main principles of selfhood underlying it, namely interdependence and interconnectedness, reveal universal truths about the human condition. Such an extension is, therefore, normatively both feasible and desirable within the human rights doctrine.

## Chapter V. Extending the relational analysis to mainstream human rights law

In this final Chapter we will essentially close the discussion by empirically testing the main claim advanced in this thesis — that a relational analysis of positive obligations ought to be applied throughout human rights law because it offers a better doctrinal and analytical framework than our current mainstream individualistic approach. To verify the validity of this claim we will explore the feasibility of extending our relational analysis to a framework representing an individualistic approach to human rights. This exercise serves two purposes. First, it will allow us to appraise the claim that a relational analysis to positive obligations can be analytically integrated into our current individualistic framework of rights; and, second, it will allow us to assess if and to what extent a relational analysis contributes to solving legal disputes compared to extant approaches. To serve both purposes, we will take the ECHR framework of rights as a test case and select some landmark judgments on positive obligations, some of which have been particularly controversial. After analysing the approach of the Court, we will again seek to solve the legal dispute following a relational approach.

The choice of the ECHR framework is justified for a number of reasons. First, because it is a human rights framework embedded in an individualistic perception of selfhood, thus offering an appropriate basis for analysis. Second, the richness of its case-law allows us to apply a relational analysis to positive obligations across different contexts; and, third, at a normative level some of the most controversial outcomes in terms of positive obligations in human rights law have been produced by this highly influential jurisprudence. In this sense, it offers a particularly appropriate basis to inquire into the extent that a relational analysis is capable of offering outcomes that are morally more satisfactory.

As regards the selection of the cases, this was based on some of the following considerations. First, in order to offer a comprehensive picture of the possibilities and limits of such a framework, we have chosen cases representative of all three categories of positive obligations. We will, however, place more emphasis on the third category, since it is here where we find the most controversial outcomes. Second, to form a more comprehensive picture of the potential of a relational analysis we have not only sought to include different contexts, also but where an analogous claim was raised by both a disabled<sup>655</sup> and non-disabled applicant we have included

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<sup>655</sup> For a collection on the disability case-law of the ECtHR in the context of mental disability see in particular P.

both. The purpose for this choice is to demonstrate in practice how the relational framework is not thematic-specific but capable of relating to all humans.

The cases will be reviewed in the following order. First, cases representing situations where the person asks for assistance following a prior behaviour by the State will be explored. We will focus on detention cases, which will be reviewed in the example of both a disabled and non-disabled applicant before reframing both on the basis of our relational framework. The argument will be made that within this context, the employment of fostering relations as an analytical tool has been inconsistent. However, when they are taken into account they reflect an underlying vulnerability approach. Reframing the Court's analysis in accordance with the relational model would not alter the outcome, but it would provide a more comprehensive framework capable of enhancing consistency and addressing situations that are currently left unregulated.

For the second category of positive obligations, namely where the call for assistance arises following the behaviour by a private party, we will review cases of domestic violence and private assault. The argument will be made that recent case-law has followed a more relational analysis, which we are going to attribute to the profile of each applicant and the influence of thematic treaties. However, the Court's approach in structuring the relationships appears to be more intuitive rather than conscious of the conception of autonomy it is fostering. As a result, it alternates between its traditional vulnerability approach and a relational understanding of autonomy. Applying our framework would not alter the outcome in either case, but it would secure a more comprehensive and unifying framework and would, presumably, make a difference for applicants not currently covered by a thematic treaty.

In the context of the third category of positive obligations, namely where claims for assistance claims arose in the absence of anybody's prior behaviour, we will focus on two types of cases: housing rights and direct financial payments. In the case of direct payments, we are essentially dealing with two contexts: health care and welfare benefits. We have chosen to merge these together, both because the substance of the claim was analogous (i.e. a request for the State to pay for something). In addition, the Court's approach has been analogous whenever a person asks the State to pay, notwithstanding the specificities of the context. We have thus brought together within this sub-category three cases that deal with different aspects of claims for direct

payments. We did so with the understanding that any findings are applicable across this category. The argument will be made that while a relational interpretation of rights is not a panacea, it nonetheless has the potential of enhancing human rights protection in the following ways: by capturing situations of coercion that our current framework overlooks, ensuring consistency, setting higher standards of protection for one's need for a positive self-interpretation and, eventually, offering new channels to solve legal problems. While a relational framework cannot ensure that the specific service asked for will be provided, by acknowledging that a violation has occurred and at the same time expanding our framework of reference it urges the State to explore new paths of realising a right.

## **1. Detention**

It is a well-established principle in the ECHR framework that whenever a person is deprived of his/her liberty, there is a positive obligation on the State to ensure that the person is held under appropriate living conditions. The failure of the State to provide for these is a frequent source of complaint and routinely examined under the right to human dignity. In the ECHR framework this is Article 3.<sup>656</sup> As already discussed in the course of Chapter III protection is traditionally high in this category. Many scholars have attributed the ease with which the Court acknowledges State responsibility to the apparently manageable scope of the obligation; the fear of opening a Pandora's box appears to be lesser. From a legal perspective, for many scholars it is the obvious dependence of the rights-holder, which is directly attributable to the State's prior actions, that lies behind the higher protection threshold; a position which, as we argued, by itself presumes that the person is naturally self-sufficient. In fact, as we argued earlier on, some scholars treat positive measures in the context of deprivation of liberty as safeguards of a negative violation rather than pure positive obligations. The Court itself treats persons who are deprived of their liberty as generally being in a vulnerable situation as they are under the direct control of the State, without really differentiating between different types of vulnerability. In all cases the protection threshold is set very high.

In this section we will look into two cases, one brought by a disabled applicant and another by a

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<sup>656</sup> Jacobs and White, *The European Convention on Human Rights*, 4<sup>th</sup> edition, p. 94

non-disabled applicant — *Price v. the United Kingdom*<sup>657</sup> and *Chkhartishvili v. Greece*.<sup>658</sup> The claims raised were analogous. Both applicants complained about the inadequate conditions inside the facilities where they held. The interest in comparing these two cases lies in the disparities within the Court's approaches. We will argue that the first applicant, a disabled person, emerges as a helpless person embedded in a net of relations that failed to assume their protective role; the second applicant, who was non-disabled, emerges as an isolated individual to whom the faceless authorities failed to provide the necessary material welfare. However, both applicants were in analogous situations and both had analogous needs. Applying a relational analysis would not alter the outcome. It would allow us, however, to unify the Court's approach and lay out the conditions for a more comprehensive analysis capable of answering questions that are currently left in the dark.

In *Price v. the United Kingdom*,<sup>659</sup> a landmark case in the field of disability rights, the applicant who was four-limb deficient with many health problems, was imprisoned for a few days for contempt of court. She altogether spent one day in a police station and three days inside the health care centre of a prison. The conditions in both facilities were in general acceptable, but not adjusted to her needs. She complained that her imprisonment had subjected her to inhuman and degrading treatment in violation of Article 3 ECHR. In *Chkhartishvili v. Greece*,<sup>660</sup> a typical case of migrant detention, the applicant complained about her prolonged confinement in an overcrowded detention centre under deplorable conditions. A violation of Article 3 was found also in this case.

In both cases, the legal basis and applicable test were the same. Whenever the State deprives a person of his/her liberty, the Court held, there is a positive obligation to secure that the conditions of detention are compatible with the right to human dignity, including securing a person's health and well-being:

“the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured<sup>661</sup>”

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<sup>657</sup> ECtHR, *Price v. the United Kingdom*, Appl No 33394/96, Judgment of 10 July 2001

<sup>658</sup> ECtHR, *Chkhartishvili v. Greece*, Appl No 22910/10, Judgment of 2 May 2013

<sup>659</sup> ECtHR, *Price v. the United Kingdom*, Appl No 33394/96, Judgment of 10 July 2001

<sup>660</sup> ECtHR, *Chkhartishvili v. Greece*, Appl No 22910/10, Judgment of 2 May 2013

<sup>661</sup> ECtHR, *De los Santos and De la Cruz v. Greece*, Application Nos 2134/12 and 2161/12, Judgment of 26 June

The Court's long-established test to assess whether the failure to provide for adequate conditions of detention violated the right to dignity was also applied here. This included assessing the suffering of the applicant in view of the person's profile and the kind of treatment to which he/she was subjected:

“The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.

In considering whether treatment is “degrading” within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3

In *Price v. UK*, the applicant raised her complaint on two accounts. First, that the judges who passed the sentence had failed to ensure that there were appropriate establishments in which she could be held. Second, that none of the establishments in which she had been held were adjusted to her needs, as a result of which both her physical and psychological health suffered. In this respect she complained about feeling cold, not being able to access the bathroom and having to sleep in her wheelchair one night. The officers had been unsympathetic to her plight and she had even being reliant on male officers on some occasions to cover her basic daily needs.<sup>662</sup> The UK government counter-argued that the responsibility of determining which facility the applicant would be held in lied with the police and prison staff and not the judges. They also challenged the applicant's credibility regarding the other claims.

The Court first noted that the sentencing judge had indeed taken no steps to ascertain the suitability of her detention conditions. Neither had prison nor police staff taken any actual measures to ameliorate the applicant's situation, though they were aware that she was in distress:

27. The Court notes, however, that despite the doctor's findings no action was taken by the police officers responsible for the applicant's custody to ensure that she was removed to a more suitable place of detention, or released. Instead, the applicant had to remain in the cell all night,

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2014, par. 42

<sup>662</sup> par. 30



although the doctor did wrap her in a space blanket and gave her some painkillers.

28. The following day the applicant was taken to Wakefield Prison, where she was detained for three days and two nights. [...] 29. Such was the concern that the prison governor authorised staff to try and find the applicant a place in an outside hospital. In the event, however, they were unable to transfer her because she was not suffering from any particular medical complaint.

As regards the detention conditions, the Court noted that despite the diverging accounts it was beyond dispute that she had been held under conditions not adjusted to her needs and that at one occasion male officers had been employed to assist her. A violation was thus found:

“There is no evidence in this case of any positive intention to humiliate or debase the applicant. However, the Court considers that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention. It therefore finds a violation of this provision in the present case.”<sup>663</sup>

In *Chkhartishvili v. Greece*, the applicant complained under Article 3 ECHR about her placement in an inappropriate detention centre. She argued that she had been detained for six months in an overcrowded establishment, with no access to outdoors exercise and other recreation activities and was provided with inadequate food. The Government challenged her credibility. The Court set out by arguing that overcrowding, which was defined as having a personal space less than 4m<sup>2</sup>, would have by itself been sufficient to find a violation:

“the desirable standard for the domestic authorities, and the objective they should attain, should be the provision of four square metres of living space per detainee”<sup>664</sup>

In the present case, however, even though the applicant had been detained in a multi-occupancy cell with others, there was not enough evidence to substantiate that this kind of overcrowding had occurred.<sup>665</sup> The Court shifted thus its attention to the other two complaints

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<sup>663</sup> par. 30

<sup>664</sup> Par. 55. (original in french), “que le standard minimum souhaitable devrait être fixé à 4 m<sup>2</sup> par détenu”, translation on the basis of the analogous abstract in the case of *Ananyev and others v. Russia*, Appl. Nos 42525/07 and 60800/08, *Judgment of 10 January 2012*, par 144, to which the Court refers

<sup>665</sup> Par. 58. 58. La Cour note que la requérante, tant dans ses objections et mémoires devant les autorités nationales que dans ses observations devant elle, s’est plainte de la surpopulation régnant dans les cellules du service de la répression de l’immigration clandestine où elle était détenue. Toutefois, elle ne dispose pas d’éléments suffisants

of recreation and nutrition:

“In cases where the inmates appeared to have at their disposal sufficient personal space, the Court noted other aspects of physical conditions of detention as being relevant for the assessment of compliance with that provision. Such elements included, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements. Thus, even in cases where a larger prison cell was at issue – measuring in the range of three to four square metres per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting<sup>666</sup>”

The Court noted that the applicant was provided with daily food allowance set at a fixed rate of 5.87 euros, with which she could order food from outside. Citing its previous case-law it argued that the sum was too small to secure nourishment of adequate quality.<sup>667</sup> As regards recreation, the Court held that the lack of outdoors access and other recreation activities risked causing feelings of isolation towards the outside world with potentially harmful physical and psychological consequences.<sup>668</sup> A violation was thus found.

If we now review the manner in which the obligations were analysed in each case then the reasoning of Court appears to have been as follows. In both cases, the State's protective duty arose within a context where the applicant was asking for assistance following a prior State action. In both cases, the applicant was acknowledged to be in a situation of structural dependency on the State on account of which she could not be expected to cover her basic needs by herself.

In *Price* it was acknowledged that the scope of the obligation comprised access to a minimum material welfare, in this case access to a bed, toilet and warm room. The applicant's possibility to also access minimum social welfare was not addressed at all as neither party raised the topic. In addressing whether the State had discharged its obligation, the Court first took note of the

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lui permettant de vérifier cette allégation fondée uniquement sur des arrêts antérieurs de la Cour ou sur des rapports d'instances et organes internationaux concernant divers établissements et diverses périodes. Elle note aussi que, à l'issue de sa visite du 18 septembre 2009 dans ces locaux, le CPT n'a pas formulé de critique à cet égard.

<sup>666</sup> Par.56 (original in french): Translation on the basis of the analogous abstract in the case of *Ananyev and others v. Russia*, Appl. Nos 42525/07 and 60800/08, Judgment of 10 January 2012, par 144, to which the Court refers

<sup>667</sup> Par. 61

<sup>668</sup> “l'impossibilité de se promener ou de pratiquer une activité en plein air risquait de faire naître chez la requérante un sentiment d'isolement par rapport au monde extérieur, avec des conséquences potentiellement négatives sur son bien-être physique et moral”

material adequacy of the goods provided. It concluded that the minimum threshold had not been met, as the applicant could only access her bed and bathroom with “the greatest difficulty” and in some cases not at all. The Court's evaluation did not stop here, however, rather it went on to examine the attitudes of all officials involved in the applicant's imprisonment. In other words, it examined the relationship to the State through which these goods had been provided; in this case the judges, prison staff, police and nurses. While the Court did not specify the benchmarks against these would be assessed, we may deduce from the Court's reasoning that these were expected to act in an empathising, protective and proactive manner towards the applicant. The Court held for instance that the judges ought to have ascertained on their own initiative where Price would be detained, that her imprisonment was a “particularly harsh sentence”, that the prison and police officers ought to have taken action on their own initiative to ameliorate the applicant's situation and they ought to have protected her from the ordeal she went through by being exposed to male officers. In view of all this, a violation was found.

In *Chkhartishvili* the scope of the obligation encompassed access to a minimum of material welfare — in this case food, personal space and recreation — but we also find references to access to a private social life, albeit of a relatively limited scope. In this case, the Court did not recognise that access to sociability forms an integral component of all positive obligations but acknowledged that the scope of the obligation might occasionally also comprise the possibility to establish relationships with other humans should one so wish. In this case, the obligation to secure access to the outdoors and recreation, which the applicant complained about, was linked to maintaining one's connection to the outside world. The Court did not elaborate any further on the quality of the relationship, but as we will argue below, positive relationships appear to be those which the applicant chooses, for whatever reason, to establish.

In appraising the State's overall behaviour, the Court did not, then, take relationships into account but measured the applicant's suffering against numerous benchmarks, a reflection of the material adequacy criterion it relied on. It established, for instance, that the personal space provided was at the borderline of 4m<sup>2</sup>, that food worth 5,87 euros was too little and that there was no access to a recreation yard. Given that the Greek State had failed to meet at least two of these standards, a violation was found.

If we now compare the two judgments there are certain analogies. Both applicants were found to have been subjected to inappropriate conditions of detention that prevented them from covering basic daily needs. In *Price* it was about accessing the bed and the bathroom, in

*Chkhartishvili* it was about access to food and recreation. In both cases the authorities were found to be well aware of their plight. And in both cases the State's positive obligation to ensure detention conditions compatible with the applicant's dignity and well-being was violated. In each case, however, the Court followed a different approach to reach this finding.

A first striking difference between these two cases is the value attached to the relationships related to the realisation of the right and, in particular, the relationship *vis-à-vis* the State. In *Price*, even though the applicant was held by herself, she was surrounded by State officials — judges, prison staff, police officers, doctors and nurses — who were all in constant interaction with her as they sought to provide assistance. Accordingly the State's performance was assessed also on the basis of her interaction with the assigned authorities. In *Chkhartishvili*, on the other hand, even though the applicant had stayed in a heavily crowded facility for six months, she emerges as notably isolated. The facts of the case reveal, however, that she was in analogous situation and she had interacted with almost the same circle of officials as *Price*, including police, prison staff and judges to whom she had complained about her living conditions. The Court reviewed these examining the exhaustion of domestic remedies. Nonetheless, in her case the State's performance was only appraised against the adequacy of the goods and services provided.

From a normative perspective there is no reason why the relationship to the State is a parameter that needs to be taken into consideration in one case and not in the other. In both cases the applicants ended up in detention under unacceptable conditions, in both cases it was the judges, prison and police authorities that had decided to place the applicants in degrading circumstances and in both cases the authorities were well aware of the risk of exposing them to dire conditions. In *Price* because it was self-evident she should need a cell adjusted to her condition, and in *Chkhartishvili* because, as the Court rightly noted, Greece was already counting several convictions regarding its migrant detention centres. The only difference we would expect disability to make would be in the kind of services afforded to the applicant, not the very possibility of forming a relationship with the State.

From our reading, it seems that the difference in the Court's approach is most likely linked to the perceived degree of vulnerability of the subject. While both were vulnerable, *Price* was treated, on account of her disability, as particularly vulnerable, thus bringing to the fore the State's protective role in a more dynamic manner. This is particularly evident in the often cited separate opinion by Judge Greve:

“... everyone involved in the applicant's imprisonment – the judge, police and prison authorities – contributed towards this violation. Each of them could and should have ensured that the applicant was not put into detention until special arrangements had been made such as were needed to compensate for her disabilities, arrangements that would have ensured that her treatment was equivalent to that of other prisoners.”<sup>669</sup>

On the other hand, *Chkhartishvili* was also vulnerable but probably somehow presumed to be less helpless. There was the less of a need to really take her by the hand and help her find her way around as was the case in *Price*.

Neither approach is, however, particularly strong in drawing a clear boundary between a protective State and a paternalistic State. In *Price* we can discern an overly protective pattern, where, eventually, everybody else apart from *Price* herself takes an active part. The sentencing judge for instance “took no steps, before committing the applicant to immediate imprisonment – a particularly harsh sentence in this case– to ascertain where she would be detained”, “despite the doctor's findings no action was taken by the police officers responsible”, the prison governor alarmed by the doctor's concerns “authorised staff to try and find the applicant a place in an outside hospital”. What is missing as the Court reviews all these relationships is a consideration to the applicant's own input on what is happening to her — in other words, her involvement in the deliberation stage. Instead, the applicant's role is exhausted once she has communicated her complaint to the authorities, after which the authorities are expected to do what is best for her based on their own judgment. In fact, from the Court's analysis we may deduce that even if the applicant had never complained, the authorities would probably still have been expected to act on their own initiative had they felt that her situation was not satisfactory according to their own judgment. The applicant emerges therefrom as a subject so vulnerable that she relies not only on the material assistance of those in charge, but also on their judgment to offer the optimal solution.

In *Chkhartishvili* on the other hand, in the absence of any interaction with the applicant the State emerges as completely free to cover the person's needs as it deems best; because at the end it is only the applicant's material welfare against which its performance is going to be judged. The

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<sup>669</sup> *Price v. the United Kingdom*, Appl. nr 33394/96, Judgment of 10 July 2001, Separate Opinion of Judge Greve; see also separate opinions of Judge Bratza, joined by Judge Costa, who argued that “the primary responsibility for what occurred lies not with the police or with the prison authorities who were charged with the care of the applicant during her period of detention, but with the judicial authorities who committed the applicant to an immediate term of imprisonment for contempt of court.”

applicant's standing as an agent has thereby completely evaporated.

At the normative level, both approaches acknowledge that power asymmetries within one's relationships towards the State are acceptable as long as the State does not actively harm the individual, of course. In the case of *Price*, the dependency of the applicant in her relationship towards the State is not challenged at all. On the contrary, it is perpetuated by acknowledging that responsibility for how protection will be afforded lies *prima facie* with the State. In the case of *Chkhartishvili*, the power inequality is also silently tolerated, even by the mere fact that the relationship between State and applicant is left completely beyond the scope of the obligation. What both models are deficient in is analysing situations in which there is a complaint about coercion even in the absence of interference, as we analysed in the earlier case of *Matencio* on health care in prison. By way of illustration, if both applicants in *Price* and *Chkhartishvili* had received the necessary resources but had no say in what was offered to them, it appears that neither approach would have been able to capture the essence of the complaint; accordingly, no violation would have been found. Likewise, if both applicants were, in fact, happy with their conditions of detention but the State had nonetheless decided to change them for their own sake, both approaches would make it hard to predict what kind of decision the Court would have taken.

A second major difference relates to the way in which the Court employs private relationships in its analysis. In *Price*, no reference is made to the applicant's social life, for instance her family or fellow inmates. Accordingly, the scope of the obligation is only analysed in terms of access to a minimum of material welfare, such as access to a bathroom or bed. Most striking however is the case of *Chkhartishvili*. Even though the applicant had stayed in an overcrowded facility for six months, she emerges as particularly isolated. In this case, the applicant had actually complained about the social setting within the prison, complaining both about overcrowding and about the lack of access to recreation and outdoor activities. The Court, however, seemed unable to even conceive that a social life in prison was possible. This is reflected in the Court's concern that the lack of outdoor access could potentially create feelings of isolation from the "external world". In fact, where mentioned, the presence of other humans inside the prison is considered in a negative light, for instance in terms of a lack of personal space.

Consequently, the scope of the obligation is mainly defined in terms of square meters and euros except for one aspect, namely the duty to provide outdoor access. The Court acknowledged that denying access to a recreation yard could jeopardise the applicant's potential to establish

relationships in the world once released. The Court did not elaborate further on the quality of the relationships. From the Court's strongly hypothetical language, we may deduce that positive relationships would be all those which the applicant would chose to establish if released. In terms of scope, this meant that while the obligation was defined primarily as access to material welfare, one duty did also encompass the possibility to establish a social life, albeit within specific circles of people.

The Court's approach towards private relationships, a direct consequence of the individualistic underpinnings of the ECHR subject, leaves, however, too many questions open. In particular, the Court's basic principle seems to be that access to private relationships as such does not form an integral component of positive obligations. Although in some cases the possibility to establish relationships with specific circles of people might be relevant. What the Court does not explain is under what circumstances this might be relevant.

From our standpoint, in *Chkhartishvili*, for instance, what lay at the heart of the applicant's complaint was the failure of the State to lay down conditions that would have made a social life inside the prison possible. The lack of recreation meant that the applicant's possibilities to socialise were very limited; likewise, the overcrowding and the lack of personal space put too much strain on the detainee's capacity to socialise. The Court's choice to overlook all that and consider as relevant only the applicant's future possibility to establish relationships upon release. Next to the analytical ambiguity this generates, if we follow this line of reasoning then the subject in *Price* would never be entitled to claim outdoor access as she was only going to be detained for a few days. Her future socialisation was thus not likely to be hampered. In fact, the duty to provide access to recreation within a prison setting would hardly be sufficiently strong to give rise to a violation as a free-standing obligation in general. Indeed, to our knowledge, the Court seems to have never yet found a violation on this basis alone.

If we follow a relational analysis instead many of the extant shortcomings would be addressed precisely because relationships, from where most of the current ambiguities flow, are integrated and their role in realising the right analysed. Specifically, the Court could have argued as follows. In both cases, what was at stake was freedom from inhuman and degrading treatment under Article 3 ECHR. Under conditions of detention, the right to be free from inhuman and degrading treatment correlates to the positive obligation of the State to ensure conditions of detention that are compatible to human dignity. This comprises the obligation to provide access to adequate material living conditions, as well as securing the possibility for a minimum level of

sociability. In addition, to fulfil its obligation it is not enough for the State to demonstrate the material and social adequacy of the services provided, but also that these were delivered through a fostering relationship with the State which meets the standards of agency, dignity and participation.

In *Price* the applicant only complained about being deprived of access to the minimum material standards, such as feeling cold and being deprived of access to a bed and bathroom. In the absence of any relevant information in the facts of the case, we will assume that the need for private fostering relationships would also be fulfilled if the threshold of material adequacy had been met. In the case, the material arrangements were not adequate as the applicant was on many occasions completely unable to cover some of her most basic needs. In addition, as regards her relationship to the authorities involved in delivering those services, it is not clear from the facts of the case what kind of facilities were available nor which authority was responsible for choosing the appropriate facility. However, the positive obligation to ensure adequate conditions of detention would in any case require the assigned decision-making body to consult the applicant about her needs prior to her commitment to a specific establishment. This does not appear to have happened in this case. In addition, the applicant's reliance on male officers to assist her in her needs was humiliating to her. The interaction with the State thus did not meet the necessary quality standards. The positive obligation to provide adequate conditions of detention had thus been violated both on account of the inadequacy of the services provided and the absence of a fostering interaction with the State.

In *Chkhartishvili*, to fulfil its positive obligation to ensure adequate conditions of detention the State had allocated to the applicant a personal space of, presumably, 4m<sup>2</sup> and a daily food allowance of 5.87 euros and had allowed the applicant to walk along a corridor in the absence of a recreation yard. The goods and services provided were not, however, materially and socially adequate. In particular, both the allocation of personal space, the daily food provision and the access to outdoor activities and recreation were aimed not only at her physical well-being but also her moral well-being. They ought to provide conditions that would enable the applicant to socialise with other inmates without completely losing her sense of independence. While the personal space allocated to the applicant met the minimum threshold set by international standards, the daily food allowance was considered too little to cover her needs and there was a complete lack of space for physical exercise and recreational activities. In addition, by confining the applicant inside her cell, leaving her under-nourished and depriving her of any possibility for



recreation and other related activities, the applicant's possibility to socialise and establish her own network of support was severely circumscribed. As regards her relationship to the State, from the facts of the case it appears that the required standards were met. In particular, the authorities involved in the applicant's placement in detention were the judicial authorities and the prison staff. The applicant's agency was respected since she was able to choose and buy her own food with the daily sum allocated to her. In addition, she had on numerous occasions seized the domestic courts and the police authorities, with the aid of a lawyer, to challenge her committal to detention on account of her living conditions. Neither was she treated in a humiliating manner. Hence, the obligation was violated on account of the material and social inadequacy of the services provided.

If we now compare this suggested analysis against the more individualistic analysis followed by the Court, then we may draw following conclusions. In terms of outcomes and securing human rights protection, the result is the same since a violation is found under both frameworks. If we look at the reasons for which the violation was found, however, and the tools that a relational framework offers us to assess State behaviour, then the relational account is more comprehensive. It is capable of addressing both situations where the complaint relates to the material side of the obligation but also those on the relational side. In that sense, its added value lies not only in its comprehension but also its ability to thus enhance legal predictability. In addition, it offers a framework that fares better in terms of methodological consistency as it is capable of applying the same tools not just within the same treaty framework but within overall human rights jurisprudence. In this case, two frameworks designed at completely different times, namely the ECHR and the CRPD, could still rely on the same framework to analyse analogous legal disputes.

## **2. Domestic Violence and Harassment by Private Parties**

Within mainstream human rights jurisprudence, common cases of positive obligations where the State is asked to provide protection from the harmful behaviour of a private party involve violence and abuse within the private sphere and the State is expected to take action and safeguard the individual's well-being from the abuser. According to the circumstances of the case, the kind of intervention expected varies. It can be of a preventive or remedial nature and

involve action at either the legislative, administrative or operational level. Within the ECHR jurisprudence we can find practically all combinations. Depending on the gravity of the allegations, such complaints are normally examined within the scope of Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment) or Article 8 (right to family and private life) ECHR. The protection is in general high, in particular when the person is vulnerable, although tends to diminish relatively when a non-vulnerable individual requests operational measures.

The focus here will be on two recent cases, *Dorđević v. Croatia*<sup>670</sup> and *Opuz v. Turkey*<sup>671</sup>, each one of which is considered a landmark judgment in its field. In *Dorđević v. Croatia*<sup>672</sup>, decided in 2012, the subject-matter was violence against a disabled person. The applicant complained, together with his mother, about the failure of the Croatian State to protect him from on-going harassment by the children of the neighbourhood on account of his mental disabilities. For five years the applicant had been subjected to verbal abuse and other anti-social behaviour as a result of which he had suffered physical and, mainly, psychological damage. In addition, he had to change his daily routine to avoid confrontation with the children and had to stop certain activities outdoors, which were his only source of socialisation. *Opuz v. Turkey*<sup>673</sup> was a domestic violence case. The applicant complained amongst others about the failure of the domestic authorities to protect her from the physical attacks and death threats of her abusive former husband and the widespread occurrence of violence against women in her region. In both cases a violation of Article 3 (freedom from inhuman and degrading treatment) was found, while in *Opuz* Article 14 (non-discrimination) was also found to have been violated.

The applicable framework in *Opuz* and *Dorđević* was the same. The Court recognised that due to the gravity of the suffering sustained both complaints fell within the scope of Article 3. The latter foresaw a positive obligation on the State to protect individuals from inhuman and degrading treatment inflicted by private individuals, including the adoption of measures to prevent the occurrence of such attacks. The States were thereby expected to exhibit increased caution in cases where the victim was a member of a “vulnerable” group.

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<sup>670</sup> *Dorđević v. Croatia*, Appl no 41526/10, Judgment of 24 July 2012 (violence against person with disabilities, Article 3 ECHR, – freedom from inhuman and degrading treatment, violation)

<sup>671</sup> *Opuz v. Turkey*, Appl. No 33401/02, Judgment of 9 June 2009 (domestic violence, Article 3 ECHR – freedom from inhuman and degrading treatment, violation)

<sup>672</sup> *Supra* fn. 670

<sup>673</sup> *Opuz*, *supra* fn. ; see also *Dorđević*, *supra* fn. , par. 138

“the obligation ... requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.”<sup>674</sup>

In outlining the contours of this obligation, the Court underscored that given the complexity of human behaviour and the scarcity of resources a State could only be expected to take measures to prevent ill-treatment which it was aware of. This was defined as follows:

“Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of this positive obligation must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.[...] For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Article 8 of the Convention.”<sup>675</sup>

In both cases the Court acknowledged that the applicant was in a vulnerable situation and that the violence had been systematic. It concluded that despite being well-aware of the risk of violence the authorities had nonetheless failed to take reasonable measures to avert it and a violation was found.

In *Dorđević v. Croatia*, the State invoked the very young age of the perpetrators, the oldest of whom was 14 years old, which severely limited its options for action as criminal proceedings were impossible. The police authorities had given verbal warnings to the children and had interviewed some when the violence escalated. The school authorities had discussed the problem with the pupils and their parents, and the headmaster had sent a letter to some families. For the applicant and his mother, however, the attitude of the authorities had been too relaxed to have a deterrent effect. In *Opuz v. Turkey*, the State mainly blamed the applicant for the lack of protection. They accused her of having withdrawn the charges against her former

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<sup>674</sup> Supra fn. , paras. 158-159

<sup>675</sup> Dorđević, supra fn., par. 139

husband, as a result of which the criminal proceedings had to cease and that even though shelters were available to her she had failed to apply for access. From her side, the applicant invoked the insensitivity displayed by the authorities towards her situation and her feeling of helplessness.

In *Dorđević*, the Court noted that due to the young age of the children and the nature of the abusive behaviour, this was a situation of violence that had to be handled outside the sphere of criminal law. While the State had indeed taken some steps to discourage the children, there was a “lack of a systematic approach” and the State had failed to identify and address the roots of the violence. It also had failed to provide support to the applicant:

“Thus, the findings of the police were not followed by any further concrete action: no policy decisions have been adopted and no monitoring mechanisms have been put in place in order to recognise and prevent further harassment. The Court is struck by the lack of any true involvement of the social services and the absence of any indication that relevant experts were consulted who could have given appropriate recommendations and worked with the children concerned. Likewise, no counselling has been provided to the first applicant in order to aid him. In fact, the Court finds that, apart from responses to specific incidents, no relevant action of a general nature to combat the underlying problem has been taken by the competent authorities despite their knowledge that the first applicant had been systematically targeted and that future abuse was very likely to follow.”<sup>676</sup>

In *Opuz v. Turkey*, the Court acknowledged that the State “did not remain totally passive”, as the police had on several occasions arrested the husband, criminal proceedings had been initiated and the applicant had at one point been sentenced to pay a fine.<sup>677</sup> None of these measures, however, had a deterrent effect. In underscoring what was wrong with the State's action the Court pointed to the inaction and overall tolerance displayed by the authorities, as a result of which the overall system of protection was dependent on the applicant's own initiatives. As a result a violation of Article 3 was found:

“the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity [...] It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O. [...] Taking into

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<sup>676</sup> Supra fn., par.148

<sup>677</sup> Supra fn., par. 166

account the overall amount of violence perpetrated by H.O., the public prosecutor's office ought to have applied on its own motion the measures contained in Law no. 4320, without expecting a specific request to be made by the applicant for the implementation of that Law.”<sup>678</sup>

Invoking Article 14, the applicant further added that the violence she had suffered was discriminatory on the basis of gender. She argued that in her society a woman was viewed as a second class citizen and the property of the husband and that the law which was in force at the time perpetuated these stereotypes. In this connection she argued that the probability of a man falling victim of domestic violence was unlikely. The Government disputed this. In its turn the Court held that the law itself did not discriminate between women but that the “discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence”. It noted that there were unreasonable delays in the domestic proceedings, the sentences passed were too lenient and that the police often sought to play the mediator between victim and abuser. A violation of Article 14 combined with Article 3 was thus also found:

“It thus appears that the alleged discrimination at issue was not based on the legislation *per se* but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims. The Court notes that the Turkish Government have already recognised these difficulties in practice when discussing the issue before the CEDAW Committee (*ibid.*).

[...]The research conducted by the above-mentioned organisations indicates that when victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this connection, police officers consider the problem as a “family matter with which they cannot interfere” (see paragraphs 92, 96 and 102 above).

196. It also transpires from these reports that there are unreasonable delays in issuing injunctions by the courts, under Law no. 4320, because the courts treat them as a form of divorce action and not as an urgent action. Delays are also frequent when it comes to serving injunctions on the aggressors, given the negative attitude of the police officers (see paragraphs 91-93, 95 and 101 above). Moreover, the perpetrators of domestic violence do not seem to receive dissuasive punishments, because the courts mitigate sentences on the grounds of custom, tradition or honour (see paragraphs 103 and 106 above).

Both cases have been applauded at the scholarly level for the high threshold of protection they afforded, in particular in view of the challenges each case posed: the low-scale of violence in

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<sup>678</sup> *Ibid.*, paras 168, 170, 171

*Dorđević* and the apparent lack of co-operation with the prosecuting authorities in *Opuz*. Yet a closer look at the Court's analysis reveals significant discrepancies in the ways in which each outcome was reached. In both cases we can discern aspects of a pronounced relational analytical framework within the Court's reasoning. In *Opuz*, this was mostly attributable to the influence of the CEDAW,<sup>679</sup> while in *Dorđević*, it appears to have been more of a matter of coincidence. Yet in *Opuz* the Court did not go as far as also internalising the relational approach at a normative level. As we will argue immediately below, the values that emerge from the Court's analysis are those of a vulnerability approach within an individualistic framework. In *Dorđević* we do actually find some alignment also at the normative level, albeit rather implicit. In particular, in both cases the Court had to deal with a “vulnerable” rights-holder, who was also the subject of a thematic treaty and in both cases the Court mentioned the respective thematic treaty. *Opuz*, read in light of the CEDAW, was treated as particularly vulnerable, being a woman and a victim of domestic violence coming from south-east Turkey.<sup>680</sup> *Dorđević* was not actually labelled by the Court as vulnerable, even though the term appeared several times within the judgment.

One likely explanation for this might be that the CRPD, in light of which the ECHR was applied, does not use the term at all. From a theoretical perspective, however, a more convincing explanation is that the perpetrators were children, who themselves constitute a separate vulnerable category within the ECHR framework. Thus confronted by both childhood and disabilities it would have been difficult to declare which was more vulnerable than the other, in particular because vulnerability is normally defined with primary reference to the mainstream independent subject, who was however absent in this case. A reflection of this counterbalancing of vulnerabilities at a deeper level can be found in the Court's acknowledgment that while “acts of violence in contravention of Article 3 of the Convention would normally require recourse to the application of criminal-law measures against the perpetrators [...] The present case concerns ... a different type of situation, outside the sphere of criminal law, where the competent State authorities are aware of a situation of serious harassment and even violence directed against a person with physical and mental disabilities.” In other words, it was the kind

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<sup>679</sup> See in particular the case of *A.T. v. Hungary* (CEDAW, Communication No 2/2003, Decision of 26 January 2005) that the Court refers to, also a domestic violence case, decided by the CEDAW Committee. Following a very relational analysis, the CEDAW Committee concluded that the State had violated the Convention not only by failing to protect the applicant from domestic violence in terms of punishing the perpetrator, but also for failing to provide her with the necessary material support and for failing to address societal attitudes towards domestic violence within the country.

<sup>680</sup> *Ibid.* par. 160

of situation where the normal reasoning of the Court could not be applied because the actors would not relate at all to the mainstream metaphor of the independent subject and hence a different approach had to be followed.

This distinction between the two subjects underpinning each case is crucial since it explains the two different lines of reasoning applied by the Court in these two cases; in particular, in *Opuz* we find the Court's classical approach towards protecting a vulnerable person within an individualistic framework while in *Đorđević* the Court ends up following a relational analysis of obligations.

A first striking difference between these two cases concerns the scope of the obligation. In both cases the complaint was analogous. In *Opuz* the applicant complained about her exposure to violence under Article 3 but also about her social treatment as her husband's property under Article 3 and 14 combined. In *Đorđević* the applicant complained about the exposure to violence but also his withdrawal from society and inability to socialise on account of the suffering he had sustained under Article 3.

From our standpoint, in both cases what was at stake was not only the person's physical well-being, but also social well-being, namely the ability to establish fostering and empowering relationships with other humans; in *Đorđević* within the community context, in *Opuz* within the family context.

In *Opuz* this dimension completely eluded the Court's reasoning. Both under Article 3 and under Article 14 the scope of the obligation was understood solely in terms of absence of interference (criminal prosecution) but not in terms of access to a fostering social life. By way of illustration, in response to the applicant's complaint that societal attitudes in her society were discriminatory towards married women, the Court blamed the judicial passivity in prosecuting perpetrators for creating a "conducive environment" for domestic violence. To put it simply, the applicant was complaining about her social standing and the Court was replying with regard to her physical well-being. In *Đorđević* on the other hand, it was acknowledged that the obligation encompassed both dimensions. The scope of the obligation was described here as entailing a "systematic approach" to assess "the true nature of the situation complained of" and suggest "adequate and comprehensive measures" of deterrence. If we take into account the parameters against which the State behaviour was eventually assessed, such as the counselling to the applicant and the adoption of wider policies to shape public opinions, we can read in the Court's analysis an obligation of a much broader scope. The State is expected to not only remove a

harmful behaviour but also assist the applicant to access a fostering social environment.

From our standpoint, the approach in *Dorđević* was, however, more coincidental than a conscious endorsement of a more expanded conception of the self. This reading is corroborated by the Court's first intuition to analyse the case in terms of criminal proceedings. It was only after it established that this case fell "outside the sphere of criminal law" that it necessarily looked for a "different" way to solve the case.

It was on this basis that the evaluation of the State behaviour in each case took place. In *Opuz* the Court's analysis in terms of goods and services was essentially limited to criminal sanctions, arrests and prosecution. Interestingly enough the Turkish State mentioned it had also set up shelters for victims of domestic violence. In return, the Court responded that "even assuming that the applicant had been admitted to one of the guest houses, as suggested by the Government, the Court notes that this would only be a temporary solution. Furthermore, it has not been suggested that there was any official arrangement to provide for the security of the victims staying in those houses."<sup>681</sup> In other words, access to the shelter was evaluated as a means to deter further violence, as an alternative to criminal sanctions and prosecution, but was not perceived as a way of restoring the applicant's ability to socialise. In *Dorđević* on the other hand, the Court essentially reviewed both material and social adequacy of the services provided. It established that simply trying to verbally warn the children to refrain from the violent behaviour was, by itself, not sufficient because it lacked a "systematic approach". It then went on to explain what the State could have done to fulfil its obligation: first, protect the applicant's integrity by discouraging violent behaviours (no social workers and external experts had been involved to "work with the children," no monitoring mechanisms and policy decisions had been established) and, second, provide assistance to the victim to restore his ability to socialise ("no counselling has been provided to the first applicant in order to aid him.").

If we now compare how the Court structures relationships in each case, in *Opuz* the applicant is understood as better insulated from relationships in order to be able pursue her rights. The State is expected to set up the necessary criminal system and prosecute assaults so as to instil respect and abstention from interference. In *Dorđević* on the other hand, the applicant should be able to socialise with his fellow humans. In this case, the same positive obligation to protect a person from ill-treatment requires from the State to lay down conditions that will shape public opinion, empower the applicant and create an overall fostering environment of socialisation.

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<sup>681</sup> Supra fn , par. 172



Even more diverse is the way in which the Court structures the relationships between the applicants and the authorities involved in delivering those services. In *Opuz* the relationship between victim and authorities was treated as an integral part of fulfilling the obligation and played a fundamental role in the finding of the violation. In particular, from the facts of the case it was obvious that the applicant was terrorised by her former husband and was feeling helpless and scared. She could, therefore, not live up to the demands of the Turkish protection system, which conditioned her agreement to initiate criminal proceedings and her prior request to have access to a shelter. The Court rightly identified that given the overall social background and the concrete threats by her husband the applicant had felt coerced to withdraw her criminal charges. Along the same lines, the Court also argued that the authorities ought to have assumed a more proactive role instead of waiting for the applicant to pursue her rights to protection on her own and making the whole system dependent on her initiatives. In other words, judicial and police authorities were tasked with building a protective net around the applicant who was clearly not in a position to make authentic decisions.

While up to this stage one could argue that the Court's approach was aligned with the relational theoretical model, what is missing to complete the picture is any effort to safeguard the applicant's sense of autonomy within this process; in other words, any sense of empowering the individual as an agent. The Court underscored, for instance, how the authorities ought to have upheld the criminal proceedings, even after the victim withdrew her charges, and how the prosecutor ought to have taken action without even waiting for the applicant's request. There is no indication, however, how the authorities ought to have made it possible, at the same time, to safeguard or even assist the terrorised applicant to recover her own sense of agency. The latter could have been achieved if the Court had included in its analysis supportive measures, for instance counselling or other forms of support. By focusing on how to eliminate the threats, at any cost, the Court eventually structured a relationship of power imbalance between State and applicant, without also laying the foundations to repair this asymmetry. In *Dorđević*, on the other hand, the interaction with the State was not addressed as part of the obligation. We may only deduce from the Court's recommendations as to which measures would have been adequate that a more interactive relationship between State and citizens seems to have been envisioned. The Court's recommendations about preventing violence but also providing counselling to the victim, involving social workers and “working with” the children necessarily involve opening channels of communication and an enduring interaction with the State so as to

collectively reach the optimal solution.

If we now compare both structures of positive obligations, then in *Opuz* the Court essentially acknowledged that the positive obligation to protect from private ill-treatment comprises a material dimension only, namely one's physical integrity. On this rather narrow basis the State was expected to take adequate measures of protection, namely of punishing the perpetrators. Given that the victim was particularly vulnerable, the Court emphasised that to discharge its obligation, it was not sufficient for the State to take adequate measures but also to use its power to ensure that these are realised through an overtly protective relationship to the applicant. Eventually a violation was found on both grounds.

As regards the applicant's complaint under Articles 3 and 14 about her overall social standing as a wife, the Court defined the scope of the obligation in analogous terms: protection from interference on the basis of gender. In this case, it held that the measures provided were adequate but that the State had failed to develop a protecting relationship which would have discouraged domestic violence and a violation was found. In *Đorđević*, on the other hand, the Court acknowledged that the positive obligation to protect from private ill-treatment comprises both a material and relational dimension: namely to protect the bodily integrity of the victim but also ensure that he has access to a fostering social environment. On this basis, the State would discharge its obligation if it ensured that the measures taken were materially adequate, presumably against both dimensions. In assessing the State behaviour the Court held that the goods and services provided were not adequate and found a violation without explicitly taking into account the interaction between State and applicant.

If we applied our relational analytical framework to solve the case, we would have the following analysis.

The right to be free from inhuman and degrading treatment, as foreseen under Article 3 ECHR, correlates with the positive obligation to protect individuals from ill-treatment inflicted by private individuals, including measures to effectively deter such violence from happening. The obligation comprises, however, not only access to a minimum of material welfare, in this case physical integrity, but also access to a minimum of social welfare that makes the realisation of the right possible; in other words that he/she is able to establish relationships without entering into a situation of extreme dependence. In addition, in terms of fulfilment, the State also has to provide not only material guarantees in terms of goods and services but also ensure that these are offered through a relationship to the State that meets the requirements of agency, dignity

and participation.

In *Opuz* the applicant complained both about the failure of the State to protect her from her abusive former husband and about the failure of the State to protect her social standing as a woman within society, as a result of which she had been subjected to violence.

To discharge its obligation under Article 3 the State had taken some measures in order to protect her integrity. The authorities had put in place the necessary criminal law they had, on several occasions, arrested the perpetrator and they had sentenced him to pay a fine. As for the applicant's ability to enter into fostering relationships, the applicant did not raise any complaint in this respect. The facts of the case reveal that notwithstanding the violence she was exposed to, she was able to maintain her own network of support (mother, sister, lawyer, partner) throughout her ordeal. We may thus assume that if the measures taken were materially adequate, her social welfare would be ensured. The measures the State had taken, however, had proven inadequate because they had failed to effectively deter the applicant's abusive behaviour which kept on escalating over a prolonged period of time.

In addition, in offering these services the Turkish State had failed to establish with the applicant a relationship that met the standards of agency, dignity and participation. In particular, the prosecutor had halted the proceedings against her former husband after the applicant had withdrawn her complaint. The notion of true agency, however, encompasses not only a person's decisions but also the process through which these are made. In this case, given the overall context, the prosecutor was required to inquire into the reasons behind the applicant's decision to drop her complaints and ensure not only that the applicant's integrity would be protected by upholding the proceedings but also that she received the necessary support to restore her injured sense of agency that the continuation of the proceedings and her mandatory participation might have aggravated. Overall, therefore, the positive obligation to protect from ill-treatment under Article 3 ECHR was violated both because of the failure of the State to take adequate measures to protect her right and to offer these in a manner that met the standards of agency.

As regards the applicant's second complaint, Article 14 read together with Article 3 correlate with the positive obligation to protect a woman from being subjected to domestic violence. The State is obliged to not only secure the woman's integrity but also ensure that she is able to enter into relationships without being in a situation of extreme dependency. In addition, in offering the goods and services the State must also ensure that in doing so it forms a relationship with

the applicant that meets the standards of agency, dignity and participation. In the present case, the applicant complained that she had been subjected to domestic violence as a woman and that she lived in a culture where a married woman was treated as her husband's property. To fulfil its obligation the State had put into place the necessary legislative framework to criminalise domestic violence. However it was not effective in deterring the occurrence of domestic violence against women as reflected in statistics.

The measures had also been inadequate in securing the applicant's possibility to enter into a marital relationship without entering into a situation of complete dependence on account of her gender. While the State had amended its law, this had proven insufficient to reconstruct the power balances within marital relationships. The reports showed that the majority of women who were victims of domestic violence in the applicant's region were Kurdish, illiterate or of low education and without an independent source of income. In addition, in offering its services the interaction between State and victims did not meet the necessary quality standards as the authorities displayed tolerance and often sought to dissuade the victims of violence from initiating proceedings against their husbands and encourage them to return to their homes. Their standing as competing agents and, presumably, their dignity were thus not respected. As a result the obligation had been violated both in terms of the social and material adequacy of the goods provided and the interaction with the State. To discharge the obligation more structural interventions were necessary to ensure that by marrying women in the applicant's region were not entering into a situation of complete dependence.

In *Đorđević*, to fulfil its obligation the State had taken some measures, such as verbal warnings and discussions with parents at school, but these had proven inadequate as the violence continued escalating for around two years. In addition, no measure had been taken to assist the applicant, who had been withdrawing from society, to restore or maintain his ability to establish fostering relationships. On the contrary, the authorities had suggested to him to always be accompanied by his mother in his outings to ensure he would not be harmed by others. The measures taken were thus not materially or socially adequate. The applicant himself did not complain about the attitude of the authorities other than the leniency they displayed towards the perpetrators. From the facts of the case it emerges that the applicant had complained before various administrative bodies (Ombudsman, school and police) and his complaints had been recorded. In addition, the applicant's mother had on several occasions been interviewed by the authorities. Hence, the obligation was violated on account of material and social inadequacy

of the services provided.

If we now compare our suggested analysis to the Court's approach, the added value lies in the methodological consistency and conceptual clarity. We apply one framework with the same tools to solve each legal dispute, instead of alternating between different models when the mainstream framework cannot relate to the profile of the rights-holder and the perpetrator. In this sense, our approach is also less ambiguous about the parameters we apply each time in appraising the scope of the obligation and the State's performance. In addition, we provide a vocabulary to articulate what currently eludes a systematic analysis, namely the role of private fostering relationships in the realisation of the right. In terms of enhancing human rights protection, the protection afforded would not alter in either of these cases. We would expect the relational framework to mainly make a difference in cases where the Court does not apply a vulnerability approach — for instance in the less typical case where the victim is a non-disabled adult man raising complaints analogous to those of *Đorđević*. In such a case, our approach would have the potential of contextualising the claim and better adjusting the analysis to the personality of the individual compared to more impersonal evaluation the fair balance test entails.

### **3. Socio-economic entitlements**

In this last section we will deal with claims for assistance that arise in the absence of any prior private or public behaviour. The most frequent cases within this category concern calls for direct financial and material assistance by the State. We have named these as socio-economic entitlements to stay consistent with the Court's language; in practice, however, many of these claims are in fact calls for material assistance also in the context of civil-political rights. Positive obligations within this category have traditionally resulted in very low levels of protection as mainstream human rights law has great difficulty in accommodating claims when the applicant is simply unable to cover his/her basic needs by his/her own means or has gained some material access to the right but nonetheless complains. Given the wide diversity in the cases found in this last category, we have focused on two types of claims that have produced some of the most controversial landmark judgements. The first group deals with claims by homeless people to be

provided with housing, often of their choice. In the second group we have brought together three cases dealing with welfare entitlements and social payments. While they deal with different contexts, namely health care and welfare, the substance of the claim was the same: all three applicants were asking the Court to directly cover the costs of some of their most basic needs. We have thus generically named this group as calls for financial assistance. All three cases deal with different aspects of such calls that the Court has over time been asked to resolve.

#### **a. Housing rights**

The obligation of the State to provide with housing those who cannot afford it was examined in *Marzari v. Italy*<sup>682</sup> and *Codona v the United Kingdom*.<sup>683</sup> What is of particular interest here is that in both cases the State had actually offered some kind of shelter to the applicants but not one tailored to their needs and wishes. In *Marzari* the applicant, who was on a wheelchair, complained that although he had been provided with different housing options none of these had been adjusted to his needs. He also complained about the location of the housing in a remote place with many infrastructural barriers for persons with reduced mobility. In *Codona* the applicant, a homeless gypsy, had been offered temporary accommodation within a bed and breakfast. She complained that this kind of housing was not compatible with her gypsy culture and asked to be allocated a space where she could set up her caravan together with her extended family. Both applications were examined under the scope of Article 8 on private and family life and both were dismissed.

In both cases the legal basis was the same. The Court acknowledged that even though Article 8 does not as such provide for a right to a home, there could be cases where such a positive obligation may arise. Its scope, however, was going to be limited:

“The Court recalls that Article 8 does not in terms give a right to be provided with a home (see, for example, the *Chapman v. the United Kingdom* judgment of 18 January 2001, § 99, to be published). It considers therefore that the scope of any positive obligation to house the homeless must be limited.”<sup>684</sup>

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<sup>682</sup> *Marzari v. Italy*, Appl. No 36448/97, Decision of 4 May 1999

<sup>683</sup> *Codona v. the United Kingdom*, Appl. No 584/05, Decision of 7 February 2006

<sup>684</sup> *O'Rourke v. the United Kingdom*, Appl. No 39022/97, Judgment of 26 June 2011

In *Marzari v. Italy*<sup>685</sup> the applicant had first been allocated an apartment by the Italian authorities, on account of his disabilities, which was not adjusted to his needs. He adapted the place at his own expense, but was subsequently forced to leave. He was thereafter allocated a second apartment which was, again, not suitable. The applicant ceased his payments to the housing authority demanding the place to be modified. This led to a chain of judicial proceedings that ended with the applicant being evicted. Eventually the provincial authorities stepped in and found, in consultation with a medical commission, a place for the homeless applicant in a remote village in the countryside. While this third place was also unsuitable, the authorities offered to make the necessary changes as long as the applicant would sign the lease contract first. The applicant, who was by then hospitalised, refused because he preferred that they modified the second apartment instead. Following this he was evicted from the hospital on the grounds that accommodation had been made available to him by the State.

In his complaint before the Court the applicant invoked the failure of the authorities to provide him with accommodation adjusted to his needs as required by the Italian law. He complained that the last apartment he had been offered was even less suited to his needs compared to the previous apartment and was located in a small village with many infrastructural barriers for wheelchair users. In his view, he should be allowed to return to the second apartment which was still vacant. In its turn, the State counter-argued that it had done everything in its power to find housing for the applicant.

In reviewing the case, the Court held that the positive obligation to provide a person with a home did not go as far as providing a person with a home of his choice, and while it was true that the apartment was not suited to the applicant's needs, by providing accommodation and being willing to adjust it in the future the State had done enough to discharge its obligation:

As regards the alleged failure to provide the applicant with adequate accommodation, the Court observes that, in order to find a solution to the applicant's housing problem, the Province of Trento has set up a specific Commission for the study of metabolic diseases, has requested this Commission to find an adequate apartment for the applicant, has allocated it to the applicant and is willing to carry out the further works indicated by the Commission for the study of metabolic diseases.

It is true that the applicant refuses to accept this apartment on the ground that it is not suitable and alleges that his previous apartment would be more suitable.

However, it is not for the Court to review the decisions taken by the local authorities based on

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<sup>685</sup> Supra fn.

the assessment made by the Commission for the study of metabolic diseases as to the adequacy of the third apartment. The Court considers that no positive obligation for the local authorities can be inferred from Article 8 to provide the applicant with a specific apartment. The Court notes that the local authorities are willing to carry out further works in the third apartment to make it adequate to his condition.

In these circumstances, the Court considers that the local authorities can be considered to have discharged their positive obligations in respect of the applicant's right to respect for his private life."

In *Codona v. UK*<sup>686</sup> the applicant, who was a gypsy, lived with her son and extended family in caravans in a park. Following their eviction from the area, the applicant made a homelessness application specifying that she wished to continue living in her caravan close to her extended family. She explained that as a gypsy she had a real aversion to buildings and had never slept a single night inside one. In their reply the authorities specified that no such place was available and allocated to her and her son a place in a bed and breakfast establishment, which she refused. In her application before the Court the applicant complained about the failure of the UK authorities to provide her with suitable accommodation in accordance with her lifestyle under Article 8 ECHR. She also argued that she was treated in a discriminatory manner compared to other homeless persons under Article 14 (non-discrimination) who were provided with housing according to their lifestyle and were not asked to live in a caravan.

In its turn the Court set out by declaring that the positive obligation to provide a homeless person with accommodation could not go as far providing housing of one's choice. However, there might be cases where the authorities are obliged to offer a homeless gypsy accommodation suitable to the gypsy way of life though its scope was limited and subject to availability:

The Court recalls that Article 8 does not in terms recognise a right to be provided with a home, let alone a specific home or category of home – for instance one in a particular location. [...] Following *Chapman*, the Court does not rule out that, in principle, Article 8 could impose a positive obligation on the authorities to provide accommodation for a homeless gypsy which is such that it facilitates their "gypsy way of life." However, it considers that this obligation could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not "suitable" for the cultural needs of a gypsy.

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<sup>686</sup> Supra fn.



In this case, in the absence of caravan sites the authorities had fulfilled their obligation by housing her in a bed and breakfast until a long-term solution could be found. The Court acknowledged that the applicant “has been placed in an unenviable solution,” but refusal to accept housing was the applicant's own choice for which the State could not be held responsible:

[...] the Council in the present case had attempted to find a suitable official site but it could not find one. It accepted that the provision of bed and breakfast accommodation was unsatisfactory, and solely a temporary measure. Moreover, the Court notes that the Court of Appeal explicitly considered that bed and breakfast accommodation offered by the Council could cease to be suitable by reference to Article 8 if it lasted too long “*suitable long-term accommodation in the form of conventional housing or, if it can be found, a caravan site can be provided*”. The Court therefore considers that the domestic authorities were alive to, and complied with, any positive obligation that they owed under Article 8 to facilitate the applicant’s “gypsy way of life,” to the extent that such was possible given the constraints of available accommodation.

The Court accepts that the applicant has been placed in an unenviable position. It also accepts that the applicant’s family and private life, as well as her ability to enjoy her home (in the form of her caravan) may well now be the subject of disruption [...]. This being so, it cannot accept that the applicant’s refusal of such accommodation was anything other than a choice for the consequences of which the respondent State is not responsible.”

In both cases, the substance of the claim was analogous: both applicants wished to be provided with housing of their choice. In *Marzari*, the applicant desired an apartment adjusted to his needs and in the town in which he was already living, while in *Codona* she wished to live in a caravan close to her extended family as she had a cultural aversion to conventional housing. Interestingly enough, even though both applicants, namely a disabled person and a gypsy woman, are normally characterised as members of vulnerable groups, the term was notably absent and no vulnerability approach is discernible within the Court's analysis.

In both cases the Court's departure point was the same: while there was *prima facie* no obligation under Article 8 to solve a person's housing problems, there were exceptional cases where such an obligation might arise. In both cases, this obligation had arisen; in *Marzari* because of the applicant's frail health and in *Codona* because she was a gypsy. Nonetheless, the positive obligation to provide housing acquired a different meaning and scope of the obligation within each judgment — a direct outcome of the way in which fostering relationships were treated.

In particular, in *Marzari* the applicant had actually complained both about the technical inadequacies of the apartment as well as the impact it had on his social life. Its remote location

combined with the many infrastructural barriers in the village meant that his possibilities to socialise would be very limited. It is not clear whether the Court acknowledged this social component as part of the obligation as it summarily re-phrased the applicant's complaint as request for a "specific apartment", which in any case fell beyond the scope of the obligation. As a result, in *Marzari*, the positive obligation to provide a home was defined in material terms only, namely as providing the applicant with a roof and its scope as access to any kind of roof.

In *Codona*, the applicant also complained about both aspects, namely her deep aversion for conventional housing and her need to live together with her extended family. She linked these, however, to her gypsy culture, which is probably the reason why in this case the Court acknowledged the existence of both as constitutive elements of the obligation. From our standpoint, this broadened scope does not appear to flow from a conscious acknowledge about the importance of sociability in the enjoyment of rights but a concern for preserving a minority culture instead. Given that within mainstream human rights law members of minority groups such as the applicant are understood to be enjoying their culture "in community with others."<sup>687</sup>

This necessarily brought to the fore the relational dimension of the obligation.

Our reading is corroborated by the Court's finding that the positive obligation to provide housing may also aim at "facilitating the gypsy way of life"; in this case, it meant allowing the applicant stay in a caravan on a campsite with her extended family. The Court was quick to explain, however, that this kind of obligation could only arise in situations where there was suitable housing and the authorities were making a choice of which option to allocate — a condition which in the specific case was not met. In other words, even though the Court acknowledged that under very exceptional circumstances, and allowing for the State's resources, the positive obligation could acquire a broader scope, this was not the case here. This meant that, in the end, the same definition as in *Marzari* was applied.

What is interesting in both cases is the Court's strongly hypothetical language. In neither case does the Court actually declare that a positive obligation has arisen, but rather "does not rule out" that there might be cases where an obligation might arise. What these circumstances are are never actually defined. Ultimately, we may deduce from the Court's analysis that to house a disabled person or a homeless gypsy is a positive obligation but some uncertainty is still left. While both applicants are normally characterised as members of a vulnerable group, the Court refrained from using the term to define the obligation. There seems to be no valid legal reason

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<sup>687</sup> ICCPR, Article 27

why this was not the case, since both appeared particularly vulnerable. A likely explanation is that had it done so the State's protective duty would have been triggered in a much more dynamic manner, which the Court was obviously trying to avoid.

The Court's overall ambiguous language and the different definitions of the positive obligation it provides are, by and large, attributable to the individualistic subject underpinning the ECHR, which prohibits the express acknowledgement of a general obligation to provide a home. As a result, whether such a positive obligation arises and what kind of content it acquires ends up being decided on an *ad hoc* basis and changes according to the profile of the subject. In the present case, the applicant in *Codona* being a member of a protected minority brought to the fore – at least in theory – the relational dimension of the obligation. On the other hand, in *Marzari* there was no such obvious connection and the applicant was treated as a more dependent version of the mainstream individualistic subject.

In placing limits, the Court underscored that the obligation could not extend as far as providing housing of one's choosing. This was phrased in an axiomatic manner. Even in cases where different types of accommodation were available, the Court made it clear in *Codona* that this did not actually create a right of choosing; the need to preserve a culture could only place limitations to the discretion of authorities that "were making a choice". While the Court might have been guided by a concern about the financial implications of acknowledging the freedom to choose, the same level of prudence could have been achieved by acknowledging that while there is a choice this should be subject to the State's resources; in other words, at the very least it could extend the definition it had developed in *Codona* to all cases, including *Marzari*.

From a legal perspective, the absolute denial of the applicant's possibility to even reflect on what he/she may wish necessarily brings to mind the criticism made by relational theorists that we analysed in Chapter I — that within a context of dependence the individualistic framework struggles to maintain any sense of a person's autonomous agency.

When it came to evaluating the State's performance, in both cases the primary benchmark used was the material adequacy of the goods and services provided – a consequence of following the definition of housing as access to a roof in both cases. In addition, in both cases the Court appears to also have taken into account as a second parameter the good faith of the State, in a manner which – from our reading – reflects on the relationship between State and citizen. In particular, in *Marzari*, the Court noted that: "the Province of Trento has set up a specific Commission for the study of metabolic diseases, has requested this Commission to find an

adequate apartment for the applicant, has allocated it to the applicant and is willing to carry out the further works indicated by the Commission for the study of metabolic diseases". Here, next to the material aspect which is rather straightforward (housing service, allocation of apartment, repairs in progress), the Court also noted that the State was "willing" to make repairs in the apartment and that a committee familiar with the needs of the applicant was involved. Both observations seem to reflect a certain reassurance from the side of the Court that the applicant's needs were adequately taken into account. From our reading, this kind of consideration reflects upon the interaction between applicant and State.

If we now review the facts of the case to which these two observations relate to then it is hard to dispute that the relationship between applicant and the authorities was particularly strained. Even though the applicant had from the beginning requested a house with specific technical details, as he was entitled to by law, the authorities never actually provided him with one, as a result of which he bore all financial burdens of adapting it. When he protested by ceasing the payments to the housing office the authorities instituted proceedings against him and he was eventually evicted. Even after the medical commission was established, the house allocated was still not suitable to his needs and he was placed in a remote location with many barriers to wheelchairs. Given that the applicant described it as even worse than all previous solutions we may assume that he hardly had any input in the commission's decision-making process. When he refused to accept it he was once again evicted, this time from the hospital he was staying in.

Seen as a whole, the consideration of the applicant's needs that the Court appears to be invoking is, in the end, a product of the authorities' own judgment as the applicant's voice is completely suppressed within this process. In fact, the only choice made available to the applicant is to either accept the house allocated or be homeless. If he refused, which he eventually did, it was described by the Court as "his own choice" for which the State was not responsible. The image of the subject that emerges therefrom is that of a passive and dependent recipient, who does not take part in the judgment; in this case, the applicant even appeared as a troublesome one. Seen as a whole, the applicant stands in a relationship of clear power imbalance to the State, with the Court implicitly approving of it.

If we now compare the equivalent section in the case of *Codona*, here the Court observed that "the Council in the present case had attempted to find a suitable official site but it could not find one. It accepted that the provision of bed and breakfast accommodation was unsatisfactory, and solely a temporary measure." In addition, "the Court of Appeal explicitly considered that ...

*“suitable long-term accommodation in the form of conventional housing or, if it can be found, a caravan site can be provided”* (emphasis added). The Court therefore considers that the domestic authorities were alive to, and complied with, any positive obligation that they owed under Article 8 to facilitate the applicant’s “gypsy way of life”...”.

The Court's reasoning here is analogous to that of *Marzari*. The Court reviewed first the material adequacy of the measures provided, in this case the allocation of a place in a bed and breakfast, but then also made observations about the State's express willingness and efforts to find housing suitable for the applicant. While in both cases the Court seem to approve equally of the interaction between applicant and authorities, if we review the facts of the case there are many and significant differences. Contrary to *Marzari*, we witness here a prolonged discussion between the applicant and the authorities about the housing she would be allocated. In her first application to the housing authorities she explained that having lived all her life in a caravan she had two requests; not to live inside a building and to stay close to her extended family. The housing authorities replied that while this kind of accommodation was not available, they would make an effort that the families stayed in proximity to one another. As a temporary solution she was offered the room in a bed and breakfast. The applicant challenged the decision judicially, with the courts acknowledging that her stay in the bed and breakfast had to be temporary and a long term solution had to be found, including the possibility of a caravan site. Having exhausted the judicial path, the housing authorities made a new offer, the details of which were unknown but which the applicant in any case refused (“It is in particular not clear whether the Council offered bed and breakfast or permanent settled accommodation and/or whether it restated its view that there were no suitable caravan sites available”). A few months later the government put under review its policy so as to increase the number of authorised caravan sites made available to gypsies. (“The applicant has submitted a press release from the Office of the Deputy Prime Minister dated 7 March 2005, from which it appears that the Government is consulting on a revision to the directions given to local authorities with a specific view to increasing the number of authorised caravan sites available for use by travellers and gypsies.”).

If we now compare the two cases, similar to *Marzari*, the applicant in *Codona* expressed her preferences in her communication to the authorities and similar to *Marzari* she did not receive the kind of accommodation she wished for, at least to begin with. Contrary to *Marzari*, however, she was provided with a detailed explanation about the kind of accommodation available and the space allocated to her as well as the reasons behind this decision. She was also able to

decline it and challenge judicially the decision, without the constant threat of the agency withdrawing the offer. In addition, her situation provided the basis for discussion at a legislative level on possible amendments so the desired accommodation would become available in the long term to persons in her situation.

It is noteworthy that out of all this, the Court attached weight to how the housing authorities had “attempted to find a suitable official site” and the judges acknowledged that should such a site become available, they would try allocate a space to her, before concluding that it was Codon's “own choice” to remain homeless. It also explicitly dismissed as irrelevant the policy change. (“the Court does not consider that the apparent change in the policy of the respondent State regarding the provision of caravan sites relied upon by the applicant is in fact of relevance to the present case. Although it welcomes any steps taken to increase the number of caravan sites, it must consider the situation by reference to facts as they stand.”). Even though the kind of “willingness” the authorities exhibited in *Codona* was significantly different, the Court nonetheless only focused on those elements which made it equal to the ‘willingness’ in *Marzari*, attaching no legal weight to the rest. The Court treated the applicant as if she had no standing to choose her accommodation and could either accept or refuse the one offered, when in fact the UK authorities were deliberating at the legislative level how to best accommodate the wishes of persons in her situation. The kind of subject we thereby see emerging from the judgement in *Codona* is an individual who, on account of her dependency on the State, is expected to waive some of her freedom, when in fact she was treated as a much more competent and active agent by the national authorities. The Court's rather sweeping approach in both cases is attributable to a large extent to the under-analysed quality of the relationship between applicant and State in both judgments.

If we now wrap up both judgments, in both cases the Court acknowledges that there is a positive obligation to provide housing, which is understood as access to a roof. In *Codona*, however, the Court also acknowledges that for gypsies the positive obligation might also encompass access to one's network of support. The scope of the obligation is very limited and comprises access to any kind of roof, even if it does not match the applicant's needs and wishes. As regards fulfilment of the obligation, in both cases we may discern a reflection on the relationship between applicant and State. The latter is structured along the lines of the States being in power to decide based on its own judgment which house to allocate. As a result no legal weight is attached to the significant differences in the treatment of the applicant by the authorities in

these two cases.

We can now seek to solve both legal disputes on the basis of our relational analytical framework. The right to home, private and family life as foreseen under Article 8 ECHR correlates to the positive obligation to offer housing to a homeless person. The obligation comprises, however, not only access to a roof, but also access to a minimum of sociability that make the realisation of the right possible. In addition, in order to fulfil its obligations it is not enough for the State to provide goods and services but also ensure that these are offered through a relationship to the State that meets the requirements of agency, dignity and participation.

In *Marzari*, in order to fulfil its obligation the State had provided the applicant with three different apartments, though the dispute eventually revolved around the final one. As regards the adequacy of the State action, the facts of the case as they stand do not allow us to form a conclusive picture because we lack information on the kind of relationships the applicant would have to foster to exercise the right. In particular, the allocated apartment obviously did not meet the necessary requirements to make it functional, but it is unclear what kind of difficulties the State experienced in providing suitable housing. In addition, the State had committed itself to undertake the necessary modifications and adjust it to the applicant's needs.

What our framework would inquire into to assess the adequacy of the State action would be whether the applicant would have been able to cover his needs inside the allocated apartment by his own means, whether he would rely on others, or whether he would be provided with a professional caretaker. Further to this the house was situated in a remote location. If we follow a narrow interpretation of Article 8, as the Court would have most likely have followed, and interpreted, for instance, the right to a private life by focusing on the ability to exit the house or access certain public places, we would inquire into whether the applicant would be able to do so by his own means or with professional assistance or whether he would have to always rely on others in doing so.

In any case, however, we would find a violation because the housing had been allocated to him through a relationship to the State that did not meet the quality standards of dignity, agency and participation. In particular, the applicant's standing as a competent agent was *de facto* denied as the authorities withdrew their offers, threatened to evict him, or even evicted him every time he protested about the apartment allocated to him. In addition, there is no indication that he was included within any stages of the decision-making processes. The housing office allocated various apartments without consulting him first and without addressing any of the demands

regarding technical specifications he had made. It also appears that there was no direct collaboration with the medical commission that undertook to help find an apartment suitable to his needs, given that the applicant considered their solution worse than all previous ones. Neither were his arguments about the cost-effectiveness of maintaining his former apartment addressed. Overall, therefore, the positive obligation was violated on account of the interaction between State and applicant.

In *Codona*, in order to fulfil its obligation the State had provided the applicant with temporary accommodation in a bed and breakfast. In addition, it had committed itself to provide her with access to a site for her caravan should one become available and had begun reviewing its policy towards homeless people in the situation of the applicant. As regards the adequacy of the goods provided, this was on the borderline. Housing had been offered but it obviously did not meet the technical requirements that the applicant wished. On the other hand, the State had reassured her that this was a temporary solution to address her immediate problem of homelessness in the absence of enough sites and had initiated action to provide a structural solution to the problem in the long-term. As regards her access to a minimum of sociability, it is not clear from the facts of the case to what extent she was able to be in touch with her extended family and maintain her network of support or to what extent her family was indeed allocated housing in her proximity. Assuming that the solution provided was indeed temporary and the final settlement allowed her to live in proximity with her extended family and visit them, the action would probably be considered adequate. If, on the other hand, they were placed far from each other and she had no possibility nor State support in creating new networks of support, for instance due to language or cultural barriers, then there would have been a violation. As regards the interaction between State and applicant, the quality standards appear to have been met. The applicant was recognised as an agent capable of expressing her wishes and preferences and participating in the decision-making process, as evidenced through the careful consideration of her demands, the analytical justification on why her wishes could not be fulfilled and the representation of her views at the legislative level. In addition, there was no indication that she had not been treated with dignity.

The question that remains to be answered is where the added value of the relational analytical framework lies. Next to enhancing methodological consistency and predictability the biggest probably contribution is that it expands our basis for analysis and offers more tools to articulate and solve legal disputes. This is particularly useful in borderline cases like the above, where the



State invokes objective limitations in fulfilling the right; when the general principle of international law that a State cannot be asked to do the impossible in practice ends the human rights discussion. In such cases, relationships offer additional tools to circumvent this obstacle and push the analysis further. In terms of human rights protection, a relational analysis would not ensure that in *Codona*, for example, the applicant would certainly be allocated a camp site with her extended family, or that *Marzari* would have such an apartment or be offered 24-hour assistance instead. In both cases, however, it would ensure that the applicants would not be forced in a situation of total dependence and that even if the applicants could not have what they wished for they would still be informed in a manner that would not injure their self-perception.

## **b. Welfare Benefits and Payments**

In this last section we will review three cases that gave rise to particularly controversial judgments, namely *Sentges v. the Netherlands*,<sup>688</sup> *Andersson v. Sweden*<sup>689</sup> and *Nitecki v. Poland*.<sup>690</sup> All three cases dealt with the State's obligation to provide social assistance in terms of funding to the applicant.

In *Sentges*, the applicant, who was 17 years old and disabled in all four limbs, complained about the refusal of his health insurance to pay for the purchase of a robotic arm that would have improved the quality of his life. He invoked Article 8 ECHR (right to home, private and family life). The Court acknowledged his suffering but faced with the Netherlands' objections about the high costs entailed and the scarcity of resources, it found no violation. In *Andersson v. Sweden*, the applicant, the parents of two very young children, complained under Article 8 ECHR about the failure of the State to provide them with financial assistance so the mother could stay home and take care of her children; instead she had been offered daily childcare to pursue work. The Commission read no right to daily childcare in Article 8 and dismissed the application on grounds that the State had fulfilled its obligation. Finally, in *Nitecki v. Poland*, the applicant, a pensioner, complained under the right to life (Article 2 ECHR) about the failure of the State to pay for an expensive medicine he required. While the public health care program covered 70% of the cost,

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<sup>688</sup> *Sentges v. Netherlands*,

<sup>689</sup> *Andersson v. Sweden*, Decision of 4 March 1986, Application No 11776/85

<sup>690</sup> *Nitecki v. Poland*, Appl. No 65653/01, Decision of 21 March 2002

he argued he was unable to cover the remaining sum and had no children to help him. The Court found however that given the high costs entailed the State had fulfilled its obligation.

In *Sentges v. the Netherlands* the applicant suffered from a rare disease, on account of which he had progressively lost mobility in all four limbs and was dependent on 24-hour assistance to cover all of his basic needs, including drinking and eating. He asked his health insurance to pay for a robotic arm, with estimated yearly costs of 10,900 euros. His claim was rejected on grounds that reimbursement for this device was not foreseen, that the Ministry had rejected a proposal to include it within the list of medical devices and that he had been provided with a wheelchair and joystick instead. The applicant appealed unsuccessfully.

Before the Court, the applicant essentially opened a discussion about the notion of autonomy. He argued that autonomy and quality of life were lost when a person was completely dependent on others. While he argued even able-bodied persons do not enjoy unlimited freedom, in his case his dependence was so extreme that he was at no time able to withdraw and be alone for a minute and that he was unable to establish relationships other than for reasons of dependence. A robotic arm would not only have given him some autonomy but also alleviate the work of his caretakers, mainly his parents. In response the State counter-argued that due to its limited resources it would be unable to pay for the purchase and maintenance of a robotic arm for the around 150-400 persons per year who would be eligible for it and that the applicant was covered by the same health care insurance applicable to all.

In reviewing the arguments of both parties, the Court set out by declaring that the right to private life under Article 8 was that of primarily allowing a person to develop relationships with other humans without interference. Under exceptional circumstances, a State's inaction could give rise to a positive obligation to take measures so as to secure respect for the right, including a person's right to establish relations with others and the outside world. However, its scope was very limited:

While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. [...] Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to

establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life .

In the present case, the Court did not exclude that such an obligation might be involved. However, given that the applicant had access to the same health care standards as everybody else, that he had been provided with a wheelchair and in view of the State's limited funds to meet the demands of the health care system, the authorities had struck the right balance. As a result no violation was found:

“In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court. [...].

In the present case the Court notes that the applicant has access to the standard of health care offered to all persons insured under the Health Insurance Act and the Exceptional Medical Expenses Act. It thus appears that he has been provided with an electric wheelchair with an adapted joystick. The Court by no means wishes to underestimate the difficulties encountered by the applicant and appreciates the very real improvement which a robotic arm would entail for his personal autonomy and his ability to establish and develop relationships with other human beings of his choice. Nevertheless the Court is of the opinion that in the circumstances of the present case it cannot be said that the respondent State exceeded the margin of appreciation afforded to it.”

In *Nitecki v. Poland*,<sup>691</sup> the applicant, a pensioner, had been diagnosed with a rare disease and asked his Health Insurance to refund him the cost of a specific drug he was prescribed to treat his disease. He argued the drug was expensive, he could not afford it and he had no children to help him. The fund replied that due to limited resources they could only reimburse 70% of the price of that drug. The applicant wrote to the Minister, to which the latter responded that legislative amendments were underway to gradually make the medicine available free of charge but that the progress rate depended on the availability of resources. Before the Court the applicant complained that there was a positive obligation under Article 2 ECHR (right to life) to pay for the life-saving drug. He argued he had been making social security contributions for thirty-seven years and that without this drug he would soon pass away. The Court acknowledged a positive obligation to ensure life could arise through acts or omissions within the context of health care, including by denying to an individual treatment made available to everybody else:

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<sup>691</sup> *Nitecki v. Poland*, Appl. No 65653/01, Decision of 21 March 2002

“It cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2 [...] the Court has stated that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally

In the specific case, however, the authorities had provided the applicant with the same health care standards available to all patients. Given that they were also paying for the greater part of the cost and the scarcity of resources they had fulfilled their obligation:

The applicant, like other entitled individuals, has access to a standard of health care offered by the service to the public. In fact, it appears that over many years he benefited from medical treatment and drugs paid for by the public health service.

[...] Bearing in mind the medical treatment and facilities provided to the applicant, including a refund of the greater part of the cost of the required drug, the Court considers that the respondent State cannot be said, in the special circumstances of the present case, to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price.

The applicant also complained that the same facts disclosed a violation under Article 14 (prohibition on discrimination). The Court's analysis is rather laconic here, noting that any different treatment was justified to ensure a fair distribution of a State's financial resources:

The Court recalls that Article 14 only prohibits differences in treatment which have no objective or reasonable justification. However, the Court finds such justification to exist in the present health care system which makes difficult choices as to the extent of public subsidy to ensure a fair distribution of scarce financial resources. There is no evidence of arbitrariness in the decisions which have been taken in the applicant’s case.

In *Andersson v. Sweden*<sup>692</sup> the applicants received social assistance which allowed the mother to stay home and look after her two young children while the father was working. The assistance ceased, however, when the mother refused to place her children in a care centre so she could seek employment. Her rejection of the offer was interpreted by the social authorities as unwillingness to work. The applicants unsuccessfully sought judicial recourse, with the Supreme Court concluding that there was no unconditional right to receive a specific form of assistance.

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<sup>692</sup> Supra fn.

The only reason behind the mother's failure to apply for employment was her own wish to stay with her children.

The Commission's departure point was that the positive obligation to respect family life under Article 8 ECHR did not go as far as requiring the State to provide a place in a day care home or offer financial assistance so that one parent can stay home and care for the child:

“The Commission observes that the Convention does not as such guarantee the right to public assistance either in the form of financial support to maintain a certain standard of living or in the form of supplying day home care places. Nor does the right under Art. 8 of the Convention (art. 8) to respect for family life extend so far as to impose on States a general obligation to provide for financial assistance to individuals in order to enable one of two parents to stay at home to take care of children.”

Nonetheless in the specific case the State had discharged any positive obligation that might exist. While the refusal to offer financial assistance might have indirectly pressured the mother to pursue employment, it should be viewed within the wider policy context to promote equality of sexes and was in any case still workable for the applicants:

“It is true that under Swedish law the applicants are entitled to public assistance in order to obtain a reasonable standard of living, and that they were granted such assistance in the form of day home places but refused financial assistance, but this cannot be interpreted as a failure to respect their family life. [...] The decision of the authorities on this matter must, as the applicants have noted, be seen in the context of the general development in society which is characterised by a larger degree of equality between sexes and an increased number of women seeking employment on the labour market. It is true that as a result of the authorities' decision the applicants had, if they wished to avail themselves of public assistance, to accept assistance in the form of day home places. The applicants may well have regarded this as an indirect pressure on Mrs. K. to take up gainful employment. Nevertheless, this fact cannot raise any issue under Art. 8 (art. 8). Moreover, the Commission notes that the applicants do not seem to be in such a situation of need that the solution which they have chosen is not workable. Nor is there any other indication that the refusal of financial assistance in the circumstances of the present case could involve a lack of respect for the applicants' family life.”

If we now compare the Court's approach to analysing positive obligations in all three cases, what is particularly striking is the struggle to deal with a person's need for fostering relationships as part of realising the right. Even though this need for fostering sociability lay in the heart of all three complaints, it was only in *Sentges* where the existence of this dimension was acknowledged; probably because the applicant's profound analysis of the notion of autonomy

made it hard to overlook. Even then, the Court was notably careful in outlining the scope of this “exceptional” situation.

In particular, in *Sentges* the applicant's complaint was essentially that in the absence of a robotic arm, the quality of his life and autonomy were lost because he was unable to establish relationships with other humans other than those of dependency. The Court set out by reiterating its standard case-law that the positive obligation to protect the right to private life could also extend within the context of relations among individuals. The State's protective duty was however understood as primarily ensuring that the individual could develop his/her personality without interference by others. The obligation to facilitate one's social life could arise “only in the exceptional cases when the failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world.”

Both the language used and the many conditions attached to the obligation reflect the great difficulty in accommodating this relational dimension within an individualistic framework. An obligation to facilitate the establishment of interpersonal relations could only exceptionally arise, if the failure by the State to intervene actively impeded the person from socialising and only where the situation in question bore a 'special link' with the applicant's particular needs. In the end, whether an obligation defined in this way had arisen in *Sentges* was never really answered. The Court “assumed” it did, referring to the fact that the Dutch authorities themselves had accepted it did.<sup>693</sup>

In the end it was also never made clear what kind of threshold needed to be reached in order to secure the right to establish and develop relationships in one's private life. From the decision in *Sentges* we are left with the final impression that it is the ability to choose one's relationships, rather than the quality of the relationship itself, which is what the applicant was complaining about. (“The Court by no means wishes to underestimate the difficulties encountered by the applicant and appreciates the very real improvement which a robotic arm would entail for his personal autonomy and his ability to establish and develop relationships with other human beings of his choice.”)

On the other hand, in the other two judgments the Court completely failed to acknowledge this

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<sup>693</sup> We can find some further guidance about the scope of the obligation to facilitate the establishment of private relations in past case-law the Court cited in *Sentges*. In an analogous previous case it had held that being unable to access a large number of public buildings in one's town entailed too broad a scope. The applicant, in this case also disabled, would have had to demonstrate how she “needs to use them on a daily basis.”

need for sociability altogether. In *Nitecki*, the applicant complained about his inability to pay for an expensive medicine as a result of which his health would deteriorate quickly and he would soon die. In doing so, he complained not only about the lack of financial means but also about the absence of a private net of support, in this case children, to aid him. In essence, what his complaint really came down to was that he was unequally situated not only in terms of resources but also in terms of relationships compared to those patients who had access to a private fostering social context to assist them. On this basis he asked for a full refund of the medicine both as a free-standing obligation and on the basis of the non-discrimination principle. The Court completely overlooked the argument. It defined the positive obligation to protect life in material terms only, as avoiding the “denial of health care”, in this case making the medicine available to everybody. A positive obligation could therefrom arise only in cases where physical access to the medicine was barred. Its scope was not unlimited but circumscribed by the State's scarcity of resources. The kind of relationships a person would need to establish to access the right in the absence of a net of support fell completely out of the scope of the obligation. Along the same lines, the positive obligation to secure medical treatment in a non-discriminatory manner was defined in terms of equal financial access to the different medicines within a health care system, and its scope was limited by the society's need for a “fair distribution of financial resources”. Fairness was understood as equality of resources but not relationships.

Finally, as regards the last case, namely *Andersson v. Sweden*, the applicants complained about the failure of the State to provide them with financial assistance so that the mother could raise her very young children. In this case, the applicants did not complain before the Commission about their financial hardship at all. In fact, the State had offered them an alternative solution, namely to place their children in a day care centre so the mother could seek employment. From the perspective of the applicants, where the real difference lay between these two public schemes was the kind of relationships the mother found more conducive to her sense of autonomy: those as a housewife or as a working mother. The facts of the case reveal that she had actually sought employment in the past but had resigned preferring to stay home while her children were still very young.

In analysing the case, the Commission seemed unable to articulate this understanding of autonomy in its construction of positive obligations, instead focusing on the material side of the obligation. It declared that the positive obligation under Article 8 did not go as far as “supplying day home care places” or “ financial assistance to individuals in order to enable one of two

parents to stay at home to take care of children” or in general public assistance. Given that Sweden had in this case nonetheless made public assistance available we may deduce from the Commission's reasoning that the scope of the obligation could in any case only go as far as ensuring that the State's inaction would not place the applicants into a situation of serious need. (“Moreover, the Commission notes that the applicants do not seem to be in such a situation of need that the solution which they have chosen is not workable”.)

The Court's difficulty in capturing and articulating in a legal language the applicant's complaints in most of these judgments, is directly linked to the vision of the subject it has in mind. In all three cases, the positive obligation is constructed on the assumption that the right can be exercised as long as there is no interference and as long as some minimum material standards are provided. The fact that a person may actually need caring relationships to exercise the right and in addition be naturally unable to establish or maintain these, as in the cases of *Sentges*, *Nitecky* or *Andersson*, is alien to this construction.

In evaluating the State's behaviour, in the first two cases the focus was on whether the State had taken adequate measures to discharge its obligation; in *Andersson* on the other hand, the interaction with the State was explicitly also taken into consideration. In both *Sentges* and *Nitecky* the Court's analysis of the adequacy of the measures was exhausted in terms of costs and the availability of State resources. In *Sentges* the Court accepted that the cost of the robotic arm, estimated at 10,900 euros per year per person, was more than the Dutch Government could afford and that the applicant had been supplied with a wheelchair instead under the same health care scheme applicable to all. Given that the quality of the applicant's relationships fell beyond the scope of the obligation, the right was considered fulfilled. In *Nitecky* similar reasoning was followed. The Court accepted that given its high cost and due to the lack of resources the Government could not contribute more than 70% of the prescribed medicine; the obligation was thus considered fulfilled.

From the fact that the Court was satisfied that in both cases the State had offered at least something to the applicant, we may deduce that it did take into account, at least implicitly, the State's consideration to the applicant's situation in its role as a guarantor. The facts of the case reveal that in *Nitecky*, upon rejecting his request the Health Care Fund explained the reasons behind the financial limitations of the funding and referred him to social services for further assistance. In their turn, social services advised him on possible routes to obtain more funding within the extant framework. After that the applicant wrote to the Ministry, which replied that



the State was aware of the high cost of the drug and that efforts were on-going to eventually provide the drug free of charge. In *Sentges*, the authorities were less engaging compared to *Nitecky*, but also not hostile as in *Marzari*. The health insurance fund rejected the claim on grounds that the robotic arm was not within the list of medical devices approved by a Regulation of the Ministry. After the applicant initiated judicial proceedings, the health insurance board explained that the Ministry had explicitly rejected an earlier proposal of theirs to characterise the robotic arm as a medical device for the time being and that the letter of the Regulation could not be overridden. At the end, neither of the two applicants obtained the item they wished for. Compared to *Sentges*, however, the applicant in *Nitecky* was in the end treated better. He was provided with a detailed explanation with the reasons behind it, was given information and advice on how to proceed, had the moral satisfaction of having the difficulties he went through acknowledged, and was reassured that his interests had been taken into account at the level of decision-making.

In both judgments, all these considerations fell completely beyond the scope of the analysis, with the Court essentially acknowledging that the power to decide how the right will be realised lies exclusively with the State.<sup>694</sup> In *Andersson*, on the other hand, the Commission took account not only of the adequacy of the goods provided but also reviewed the interaction between applicants and State; most likely because the applicants' complaint was actually about their relationship to the State. In particular, the applicants argued that while two different options of public assistance were available, they were denied the right of choice and the only option that had been made available to them reflected the State's own values and not theirs. The mother insisted that she wished to stay home and raise her children while they were still young and that she had tried to gain employment in the past but had resigned precisely for this reason. In assessing all this the Commission noted that the form of public assistance offered to the applicants was materially adequate since it was financially "workable" and did not place the applicants in serious need. Addressing the interaction with the State it then found that while the applicants might have felt "indirect pressure on Mrs K. to take up gainful employment," in view of the overall policy context to promote equality of sexes and the participation of women in the

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<sup>694</sup> In past cases, however, the Court has required from the State as a matter of positive obligation under Article 2 to lay down conditions to shape and monitor the relationship between authorities and patients in the context of health care. Citing past case-law in *Nitecky*, the Court mentioned amongst others "the State's positive obligations under Article 2 to protect life include the requirement for hospitals to have regulations for the protection of their patients' lives and also the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned."

labour market the State had fulfilled its obligation.

If we now compare these three judgments, in the first two the Court implicitly accepts the power imbalance between citizen and State. Given that no legal weight is attached to the applicant's involvement and participation in the decision-making process, the State emerges as free to decide how to realise the right, based on its own judgment. In *Andersson* this reasoning is made explicit. The fact that the State had “indirectly pressured” the applicant to realise the right in a specific manner was considered consistent with the Convention. For the reasons already mentioned above, in the absence of any further reference this makes the dividing line between a protective intervention and a paternalistic interference very fine.

Had the Court followed a relational analysis in all three cases, the disputes could have been solved as follows.

The right to private life under Article 8 ECHR entails the positive obligation to secure the development of one's personality in relation to other humans and the outside world by providing physical access to the outside world while at the same time ensuring that the individual has the possibility to establish relationships with other humans without entering into a relationship of total dependence. In addition, to fulfil its obligation the State will have to demonstrate not only the adequacy of the goods and services provided, but also the fostering character of the relationship to the State through which these were provided, and, in particular, that the quality standards of agency, dignity and participation were met. In *Sentges v. Netherlands*, to fulfil its obligation the State had provided the applicant with a wheelchair and a joystick. These, however, were not adequate. While the electric wheelchair allowed the applicant to move around, the applicant was nonetheless only able to exercise his right by relying on 24-hour assistance both inside and outside his house for every single action he wished to perform, which was provided mainly by his family members. The facts of the case also reveal that because of the intensity of the care that was required, the family's autonomy and freedom to plan their daily activities and establish relationships with others was also severely restricted. As regards the relationship to the State, the applicant did not raise a complaint. The facts of the case reveal that he was able to voice his wishes and appeal the decision of the administrative bodies. From the available information it also seems that his interests were represented at the legislative level given that the Health care Fund had requested the inclusion of the robotic arm within the list of medical devices, a proposal that the Ministry had rejected for the time being. Overall, the positive obligation was violated because of the inadequacy of the services provided

that left the applicant in a situation of extreme private dependence.

As regards *Nitecky v. Poland*, the applicant complained that he was unable to buy a prescribed medicine because he lacked the means and did not have children to help him. Our suggested analysis would be as follows: the right to life under Article 2 correlates to the positive obligation to provide adequate health care by ensuring not only access to the necessary medical services and medicines but also that the person will not enter into wholly dependent relationships in this process. In addition, to fulfil its obligation the State would have to demonstrate not only the adequacy of the goods and services provided, but also the fostering character of the relationship to the State through which these were provided, and, in particular, that the quality standards of agency, dignity and participation were met. To fulfil its obligation, the State had set up a health care system with different benefits, funded 70% of the specific drug and had undertaken some work to eventually make the drug available free of charge. To assess whether this was adequate, a relational analysis would pose the question whether in covering his medical needs the applicant was able to resort to his own network of support without entering into a situation of total dependence. In this case, the services would be inadequate if the applicant had no children or other close relations to assist him pay the drug, or if his health deteriorated and he had no assistance to help him with his basic daily needs. As regards the relationship to the State, the applicant did not complain about it and the facts reveal that this did meet the necessary quality standards. The applicant was offered information and possible options to explore to access the right, he had the opportunity to voice his needs, challenge the rejection of his request, and his interests were represented within decision-making process and he was treated with respect. Overall a violation could thus have been found on account of the inadequacy of the services provided if the only way for the applicant to cover his medical needs would be through relations of extreme dependence.

As regards his complaint about discrimination, Article 14 read together with Article 2 entails the positive obligation to provide access to medical treatment in a non-discriminatory manner, including access on equal financial and relational terms. To fulfil its obligation, the State had set up a health care system available to all and reimbursed 70% the cost of the specific drug. From the facts of the case it appears that the assessment of the eligibility to the subsidy took place on the basis of a person's financial means. The applicant would have been entitled to a higher subsidy had his annual financial income be lower. In this case, if the criteria determining the 70% funding were solely quantitative criteria without taking into account the social context and in

particular one's family status then the positive obligation was violated.

Finally, as regards *Andersson v. Sweden*, a relational framework would provide the following analysis: the right to respect for family life correlates to the positive obligation to provide public assistance so as to ensure that the family does not enter into a situation of need and the members are able to exercise their right without entering into a situation of total dependence. In addition, to fulfil its obligation the State would have to demonstrate not only the adequacy of the goods and services provided but also the fostering character of the relationship to the State through which these were provided, and, in particular, that the quality standards of agency, dignity and participation were met.

To fulfil its obligation, the State had set up a public assistance system which offered destitute families the possibility to receive welfare benefits or placement in daily care homes for their children. From the facts of the case it emerges that the services provided were materially and socially adequate, since they would allow a beneficiary to enjoy his family life in accordance with these standards. In particular, it does not emerge that either option would have prevented the applicants from establishing fostering relations with their children and/or be unable to cover their basic needs without entering into relationships of extreme dependence. In the present case, however, the relationship through which these services were provided did not meet the requirements of dignity, agency and participation. In particular, in the present case the authorities effectively made only one option available to the applicants, thus restricting the applicants' choice to either accept the placement in the daily care centre or not.

The next question we need to ask is whether the 'pressure' to accept the placement aimed at enhancing the mother's sense of autonomy in the first place. This would have been the case if, for instance, coercive attitudes within the wider social context impeded her from pursuing employment despite her wishes or even restricted her ability to reflect upon the kind of role she wished to assume at first place, in this case as a working mother or housewife.

This aspect had actually been examined by some dissenting judges in the course of the domestic proceedings. They had argued that in the specific case the applicant had indicated that she wanted to stay at home as long as their children were still young, that she wished to assume work once the children were older, that she had pursued employment but then resigned and that her decision reflected a joint agreement of the parents on how to best raise the children. In any case, even if we assume that the purpose of the social authorities' pressure was to enhance the applicant's autonomy, the manner in which it was done – namely abrupt withdrawal of the

financial subsidies – was not conducive to her sense of agency because she was deprived of any possibility to choose. In fact the applicant had complained before the domestic court that she lacked professional training and she was forced in this way to undertake any kind of employment without being able to develop her skills. In addition, a relational analysis would also argue that the fact that her role as a housewife was characterised as unwillingness to work and de-valued also hurt her sense of dignity. The positive obligation was thus violated on account of the interaction between the applicants and the State.

Overall, the added value of our framework would be that it offers a basis for analysis which is broader and capable of articulating and addressing complaints which lie outside the margins of our current framework, such as in *Nitecki*. In addition, it is capable of overcoming the boundaries of our extant framework of protection in particular in cases where our current schema of positive obligation runs against problems of polycentricity, as in *Nitecki* and *Sentges*. In our framework the test does not stop there, but the boundaries are pushed further by examining how the lack of the service impacts on a person's ability to realise the right through fostering relations. In terms of enhancing human rights protection, a relational framework can bring to the fore and address sources of human rights violations that are currently overlooked. In this sense, it is capable of advancing human rights. On the other hand, in practical terms, it cannot guarantee that the applicant would in each case be provided with the requested material support and resources; this can only be achieved in cases where the specific item is the only way to avoid the enjoyment of the right through situations of extreme private dependence. A State might also be able, however, to eliminate the coercion of the relationship by providing alternative services, for instance professional caretakers. In any case, however, it will push the State to find a solution in cases where the mainstream framework fails.

#### **4. Conclusion**

The purpose of this Chapter was to inquire into the practical and analytical implications of extending a relational interpretation of positive obligations to mainstream human rights law and to explore the added value of solving legal problems through this approach. By taking examples from the case-law of the European Court of Human Rights we first demonstrated the applicability of our model to mainstream human rights jurisprudence across different contexts. By juxtaposing our suggested analysis with the analysis provided by the Court we explored the advantages of our framework. We argued that building a social component in the structure of

positive obligations explores their scope and allows us to articulate in legal language situations and complaints that elude the more narrowly constructed individualistic framework. These are situations in which the source of coercion lies in the absence of a fostering relationship to other individuals or the State. In addition, through this expanded scope we are able to solve legal dispute by going beyond the more narrow boundaries of the individualistic framework, in particular when it comes to issues of cost.

In terms of analysis, its added value lies thereby in enhancing methodological consistency not only across different contexts but even different treaty regimes. Our framework is more comprehensive and brings together within one unifying framework conceptual tools that are now overlooked or lie dispersed throughout different judgments. In addition, it enhances legal certainty and predictability because it allows us to analyse situations in unifying single, unified manner, without alternating on an *ad hoc* basis between different approaches depending on the profile of the rights-holder.

In terms of enhancing human rights protection, our framework is capable of unmasking situations of coercion that an individualistic framework overlooks. However, it cannot always ensure that a specific wish of the applicant, which could not be fulfilled within an individualistic framework, would now be realised. This could only be achieved if the specific item or service were the only way to realise the right without entering into a situation of total private dependence. In other cases, the finding of a violation could, however, pave the way for more enhanced protection by prompting the State to seek alternative ways to realise the right. What a relational framework can ensure in all cases is that even if a specific wish cannot be realised, the person's sense of selfhood will nonetheless not be injured.

## Chapter VI. Closing Reflections

In closing the present discussion, we will summarise our main arguments, appraise our theory from a human rights perspective but mostly reflect upon some of the broader implications of our account. We are addressing these implications here, separately from our main discussion, because the kinds of concerns we anticipate exceed the scope of the legal analytical discourse on positive obligations. In particular, what we view as potentially of most concern within our account is not the actual set of principles we put forward for solving legal disputes; if we agree that fostering relationships ought to be treated as a component of positive obligations, we may then debate upon and continuously revise their precise content, as is the case with all legal concepts. Where, however, the challenge really lies is reaching an agreement about the much more enhanced role for human rights law our theory envisions.

Applying a relational autonomy to positive obligations means that the State is expected to intervene and secure respect for human rights in practically all kinds of human interactions. It also means that human rights assume a much more dynamic role in the way they influence human behaviour. This kind of function for human rights law undoubtedly goes by far further than what early human rights instruments had envisioned. While the present thesis is a primarily legal study, to adequately address possible concerns we will have to place our account within the broader socio-political context within which human rights operate, namely human society itself. After outlining the main arguments advanced within thesis and identifying the strengths and weaknesses of our account, we will address the implications of our theory while taking into consideration this much bigger picture.

The present thesis set out to re-visit the notion of positive obligations in light of the formal entry of disabilities into human rights law. Intrigued by the very different approach of this latest thematic treaty towards human rights and their correlating obligations as well as by its very apt articulation of the human need for sociability that until then had seemed to completely elude human rights law, the thesis re-opened the discussion on positive obligations. This most basic yet highly ambiguous concept lacks to this day a formal doctrine and appears to have undergone a radical transformation since the early days of the human rights movement – an evolution that is particularly evident in this latest thematic treaty.

Having as a main motivation the very innovative approach of the CRPD towards positive

obligations, the thesis sought to answer two main questions: first, to explain from a legal perspective the continuous evolution and more often than not unpredictable expansion of this fundamental concept, a process which the CRPD appears to have epitomised; and, second, to bridge and synthesise within one coherent and unifying analytical framework the multitude of positive obligations and different approaches that lie dispersed within human rights law.

While the initial motivation of the thesis was the very innovative approach by the Disabilities Convention towards a long-standing concept, the overall aim of the thesis has been, however, more than conducting a theoretical inquiry. By revisiting the concept of positive obligations the thesis also aspired to advance the discussion about human rights at a much broader level by providing new tools to think and litigate human rights, advance State compliance and ultimately secure better protection to marginalised groups. In doing so, the thesis sought to bring to the fore and integrate the perspective of those who feel mostly marginalised within extant human rights law and whose voice it saw reflected in the wording of thematic treaties and in particular the CRPD.

To fulfil its purposes, the thesis re-opened the discussion on positive obligations by employing the less familiar lens of the human self. It did so under the hypothesis that the key to unlock the structure of positive obligations, understand current ambiguities and decipher the reasons behind the continuous evolution of the concept lies in the philosophical roots of human rights law, namely human nature itself. It is the metaphor for the human being we rely on when we design human rights and their correlating obligations defines our legal thinking and guides the way we design our legal tools. The thesis conceded that without this knowledge we are less likely to recognise and eventually overcome the conceptual limitations that are tied to this self-imposed image.

Looking for the right answers the thesis followed the path of legal theory that inquires into the nature of the legal subject; a philosophical exchange about the optimal metaphor to describe a rights-holder, which is loosely informed by scientific findings. The thesis engaged with the theoretical discourse on the human self from its own perspective, which comes from the perspective of a human rights lawyer, and identified two main competing schools of thought to describe the human subject: the individualistic and the relational approach. While the individualistic approach values the human traits of rationality, independence and atomism when designing a legal subject, the relational approach places the emphasis on emotion, interdependence and sociability.



Having as a main framework of reference these two influential accounts of selfhood, the thesis engaged with the human rights debate on positive obligations. Addressing first long-standing questions concerning the concept of positive obligations the thesis defended the soundness and utility of maintaining the term as such. It thereby differentiated itself from a recent growing body of scholarly work that has been suggesting to replace the notion of positive obligations and the negative-positive dichotomy with alternative typologies or merge positive and negative violations under one umbrella term. The thesis defended its position on the basis of two main arguments. First, it attributed scholarly concerns about the insurmountable ambiguity of the notion of positive obligations and the apparent lesser levels of protection it generates to the methodological approach which theorists often adopt when analysing the term. In particular, the thesis argued in favour of analysing positive obligations not as a free-standing concept – as is often the case within human rights literature – but in correlation with the human values they are supposed to serve. Positive obligations do not have a pre-determined definition, but acquire their meaning depending on the conception of the human being they are based on; they serve a specific conception of autonomy, which is tailored according to a specific metaphor for the human subject. More often than not human rights scholars do not question, however, this image but seek to expand or re-define the concept of positive obligation by relying on empirically manifested contents and boundaries, which they seek to re-arrange. The focus is thereby shifted to the symptoms and not their source, which is also why the pursuit for a higher protection thresholds often reaches an impasse.

If we adopt, however, the lens of the human self as a methodological tool we are in a better position to theorise on positive obligations. Understanding the kind of image we rely on when we design and apply positive obligations enables us to recognise our self-imposed conceptual and analytical limitations and steer our legal systems according to the normative views we wish to see realised. The thesis argued that a focus on the human self would require us to take the standpoint of the individual and examine what he/she expects from the State. In terms of substance, the core position defended was that if we adopt a moderate account of individualistic or relational selfhood we are always in a position to distinguish between a request for assistance and a request for abstention. Consequently, the concept of positive obligations ought to be maintained within our legal analysis of human rights.

Having established the normative soundness of the concept, the thesis re-visited the meaning of positive obligations. After reviewing the jurisprudential evolution of the term the thesis

highlighted the lack of a formal doctrine and the scholarly difficulties to systematise the term. Having as a main reference the two main schools of thought about the human self, the thesis discerned two principal approaches towards understanding the State's duty to act: a mainstream one, which flows from an individualistic conception of the subject and a peripheral one, based on a relational perception of human nature. The first individualistic approach understands positive obligations as calls for assistance to reach material welfare; the State is expected – as a matter of positive obligation – to assist the individual to access a minimum threshold of material well-being. Regarding its scope and limits, the obligation requires from the State to make available to the individual some necessary goods and services the range and adequacy of which is, as a rule, circumscribed by the State's financial possibilities. The thesis argued that underpinning this definition is a presumption that autonomy means independence and separateness; as long as access to certain goods has been established, autonomy is presumed to have been realised.

A relational approach on the other hand understands positive obligations as calls for assistance to enjoy both a material and emotional well-being. In other words, the State is expected – as a matter of positive obligation – to assist the individual to attain not only a minimum threshold of material welfare but also a minimum threshold of sociability. The thesis further argued that under a relational approach, scope and limits ought to be defined not solely by the State's financial possibilities as is the case now, but by whether the individual is able to enjoy a right by at least having the possibility to establish relationships other than those of complete dependence on others. In addition, to fulfil its obligation the State also ought to demonstrate that in offering its services it has formed a relationship with the recipient that meets the quality standards of agency, dignity and participation; a reflection of its caring role towards its citizens.

The thesis inquired into the practical implications of the two approaches towards positive obligations through different examples taken from human rights jurisprudence. The thesis argued that the individualistic framework characterises the mainstream approach towards human rights, as envisioned in the case-law of the ECtHR and the Human Rights Committee. The relational approach comes closer to the construction of positive obligations within thematic treaties and socio-economic instruments. The emerging case-law of the CRPD Committee is the most developed reflection of this relational framework of positive obligations. By juxtaposing the two approaches, the thesis established the normative and analytical supremacy of the relational framework.

In particular, once theory is turned into practice, a series of shortcomings emerge under the individualistic approach, which have attracted heavy scholarly criticism. The thesis summarised these by stating that the individualistic framework ends up marginalising those segments of the population that are at a social disadvantage; and that it does so in a manner that generates inconsistent and arbitrary outcomes. The overall result is therefore both normatively and analytically unsatisfactory.

The thesis attributed this outcome to two major shortcomings within the structure of positive obligations: the equation of autonomy with independence and the absence of fostering relationships as an integral component of the obligation. As a result, the individualistic framework offers a basis for analysis which is too narrowly-constructed and fails to adequately live up to the challenges of human diversity as well as relate to the human need for sociability.

In particular, once tested against real cases, positive obligations struggle to relate to those who seem naturally unable to attain the abstract ideal of independence that defines the metaphorical rights-holder. Likewise, by placing the emphasis on access to material welfare, the individualistic framework lacks the language to articulate situations where the restriction of a right lies in the absence of a supportive relationship to the State or one's social environment. As a result, positive obligations struggle to address real-life situations in which material access has been established, but it is the absence of social support, which stands in the way of enjoying a right. In addition, in the absence of additional tools, the issue of cost necessarily defines the scope and limits of the obligation in an insurmountable manner. The thesis argued that once we analyse positive obligations through the lens of the human self, many of the extant shortcomings identified by human rights scholarship appear less as the outcome of judicial half-blindedness, as is often argued; but as the outcome of the very narrow analytical basis generated by the individualistic subject, which significantly limits the conceptual tools available to solve legal disputes.

On the other hand, a relational approach offers a more comprehensive basis for analysis, which is capable of capturing in legal language a broader range of situations and helps us solve legal disputes in a more consistent and predictable manner. The analytical and conceptual tools it equips us with, namely the role of fostering relationships to the State and one's fellow humans in realising rights, better relates to the real and needful person that positive obligations naturally encounter. Once tested against real cases, the relational framework is capable of articulating and unmasking situations of coercion that elude the current individualistic framework. In

addition, it is capable of more aptly overcoming issues of costs and polycentricity because it provides additional tools to measure State compliance. The overall result is a coherent framework that unifies the multitude of positive obligations within human rights law, better contextualises right claims and enhances protection by acknowledging new sources of coercion and making use of under-explored channels of protection.

However, a relational approach also has its limits. A relational analysis cannot as such vindicate all complaints that the individualistic framework fails. Most importantly, it cannot ensure the realisation of the right in the precise manner the rights-holder envisions. Likewise, while it can ensure methodological consistency further work is needed to ensure also substantive consistency among all frameworks. What it can ensure, however, is that the complainant will have a voice within the process of realising a right and that even when a person's wishes are not realised, his/her sense of selfhood will not be wounded; a kind of comfort and empowerment that the mainstream individualistic framework is currently unable to provide.

At the theoretical level, the thesis embedded this alternative understanding of positive obligations in the evolution of human rights law and the transformation of the notions of human self and autonomy that underpin it. To defend its position, the thesis traced the origins of the concepts of selfhood and autonomy that inform our thinking about human rights. It argued that in the philosophical foundations of contemporary human rights law, namely the UDHR, lies a nuanced and flexible approach towards selfhood. This subject is best described as a 'two-minded' person that balances among different rights theories. Subsequent political and historical circumstances, however, favoured the development of an individualistic framework of human rights. As a result, mainstream human rights law was structured around the image of a person who is best described as a presumably (individualistic) autonomous subject. While this mainstream image was initially meant to be complemented by a fundamentally dependent and sociable counterpart, political reluctance hampered the process of this integration and left the missing dimension in a prolonged dormant state. As a result, the conception of the individualistically autonomous person dominated the mainstream human rights discourse.

Over recent years a series of thematic treaties and peripheral instruments have juxtaposed to this mainstream conception of the individualistic autonomous human rights holder a group of particularly vulnerable individuals, such as women, children, migrant workers and persons with disabilities, who are in need of care and assistance in order to be able to realise their rights. Instead of treating these thematic subjects as vulnerable exceptions to the mainstream

metaphor, the thesis argued that we ought to read in these ongoing developments a much deeper transformation of human rights law. It is a process of rectifying and complementing our mainstream metaphor with human dependencies. This evolution has been epitomised by the CRPD, which underscores the universality and infinity of human dependence and interdependence. The thesis further argued that this transformation does not stand on thin air but may be traced back to UDHR conception of the two-minded and interrelated human person. Within the human rights discourse, the position we have defended in this thesis is consistent with those accounts that accuse human rights law of anthropological bias and call for a metaphor of the human subject that better relates to the marginalised group they represent. It also finds support in those accounts that dismiss the idea of the independent rights-holder and advance the notion of universal vulnerability as a new framework for analysing human rights. Within both strands of literature we find a shared acknowledgement of the limitations of the mainstream subject, the unsatisfactory results once turned into practice, and a call for a more nuanced understanding of the human subject that is truer to how humans really are. What the present thesis adds to this discussion, and where it also differentiates itself, is in the proposal for a relational subject as our mainstream metaphor in international human rights law; and in the development of a set of concrete tools to render a relational analysis of human rights applicable in any given legal situation. As a first step in this direction, the thesis exemplifies its suggestion by applying a relational approach to positive obligations and exploring its potential against concrete case-law.

Treating positive obligations as a means to shape human relationships in a favourable manner, even within the most intimate spheres of life, has however immense practical implications that go far beyond the field of the law. Applying a relational analysis to positive obligations, does not only entail theoretically interpreting human rights treaties in a specific ways. It also directly impacts on the ways in which courts solve legal disputes, analyse compliance and eventually define State responsibility. In addition, while the subsidiary nature of human rights law means – at least in theory – that it is not up to a human rights court to “engineer changes in society or to impose moral choices”, the dividing line between law and social reality is in practice not as watertight;<sup>695</sup> human rights norms and human rights judgments do have an impact on an individual's value systems, human behaviours, social norms and even the wider political and

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<sup>695</sup> L. Wildhaber, “The European Court of Human Rights in Action”, *Ritsumeikan Law Review*, No. 21, 2004, p. 86

legal landscape.<sup>696</sup>

Employing therefore human rights to structure an engaging and caring society raises questions of a much broader scope. Abandoning the individualistic framework in favour of a relational scheme attributes a much more enhanced role to human rights law. Human rights do not merely aim to constrain aggressive State action as envisioned in the early days of the human rights movement in the wake of the Second World War. They undertake to reform society in a much more dynamic and sweeping manner by laying down basic rules, the ultimate aim of which is to generate a caring and compassionate world within which human life will thrive. In other words, they become powerful tools of social change as opposed to merely functioning as a safety net against atrocities and totalitarian regimes.

We cannot adequately appraise and justify this expanded role of human rights law and its immense practical implications unless we place our discussion within a theoretical shift of a much broader scope and take into account the larger socio-political context within which human rights operate.

The philosophical discourse about reconceptualising autonomy in our rights systems goes hand in hand with the much wider theoretical debate on defining the kind of society we want to forge and to live in; a discourse that has witnessed a growing feminist call for the values of care. Rights systems embedded in individualistic notions of the self are linked to contractarian perceptions of what a just society ought to be like while relational theories of rights are connected with feminist approaches towards political justice. In a nutshell, contractarian theorists assume that citizens are rational, free, independent, equal and self-driven. A just society requires that all resources, including rights and duties are distributed on a fair basis, without disadvantaging anybody.<sup>697</sup>

The antithesis of this is the vision of a society of needful and dependent citizens. Humans are assumed to enter into society not out of self-interest but out of love for justice, compassion for those in need and altruism. They are not isolated but find fulfilment in their relationships with other humans. A fair society is not one that aspires to productivity, but one that ensures that every citizen, endowed with different talents and capacities, can lead a worthy and dignified life.

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<sup>696</sup> For a recent discussion see K. Lohmus, *Caring Autonomy, European Human Rights Law and the Challenge of Individualism*, Cambridge University Press, 2015, pp. 2-6

<sup>697</sup> See the classic work of J. Rawls, *A Theory of Justice*, Harvard University Press, 1971. For a critical discussion see L. Carlson and E. Kittay, *Cognitive Disability and its Challenge to Moral Philosophy*, Wiley-Blackwell publ, May 2010; see also M. S. Stein, *Distributive Justice and Disability: Utilitarianism against Egalitarianism*, Yale University Press, 2008

To achieve this it does not distribute its scarce resources equally among its citizens but seeks to ensure that every citizen can function in a variety of areas of central importance or, in other words, can attain certain central capabilities. Such capabilities include, for instance, life, health, emotions and affiliation with others. The overall aim is to ensure a flourishing life for all persons, including those who are most in need and those that care for them.<sup>698</sup>

The discourse of social justice cuts across the discussion of human rights at many different levels. If the language of rights attributes high moral resonance to certain public commitments, it is theories of public policy that define the benchmarks and ways in which basic entitlements are to be secured within a wider context of competing claims. The language of capabilities, which uses human functioning and well-being to define rights, is conceptually affiliated with the relational approach, while contractarian benchmarks are associated with the more formalistic individualistic framework of rights. Most relevant for the position we have advanced in this thesis is, however, the increasingly large role a caring society ascribes to human rights. Traditionally, human rights act as a system of side-constraints in the context of international and internal policy debates. The theory of the caring society, however, which shapes itself for its needy citizens and strives to offer them opportunities for a flourishing life, aligns the list of primary goods citizens are entitled to with the entitlements laid down in international human rights instruments. Human rights, in other words, no longer act as side-constraints that simply must not be violated by other social goals, but become social goals themselves that must be secured as a matter of priority.

If we now review our account of positive obligation in light of this wider political discourse, we see that the enhanced role our relational theory ascribes to human rights and its foreseeable long-term implications are embedded within it. Even though our primary aim within this thesis is to offer a legal study, seen in light of this discussion it would be hard to deny that our application of relational autonomy to positive obligations does not entail some modest reflection of these broader norms.

Having provided a brief glimpse into the bigger picture, we can now better predict, and also address, the possible implications of our doctrine on positive obligations and its overall impact on our human rights system. In particular, we expect two kinds of objections, which are

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<sup>698</sup> M.Nussbaum, *Frontiers of Justice*, The Belknap Press of Harvard University Press, 2006; for a critical review, see M.A. Stein, "Disability Human Rights", *California Law Review*, Vol. 95, 2007, pp. 75-121 ; M.A. Stein and S.Silvers, "Disability and the Social Contract", *The University of Chicago Law Review*, Vol. 74, 2007, pp. 1615-1640

interconnected with each other: first, whether it is acceptable to use the power of human rights to regulate human interactions across, presumably, all spheres of life; and, second, whether our account does not end up recreating what it sought to rectify at first place, namely paternalistic approaches to how human rights ought to be enjoyed. It could be argued, for instance, that a relational analysis assumes that there is only one idealistic way in which interactions ought to take place.

Within our thesis we sought to avert some of the potentially negative implications of our approach by profiting from the work already undertaken by legal theorists in setting clear limits of what a State can and cannot do. We followed a cautious approach towards relationships and developed an analytical model that drew clear boundaries around the scope of the obligation. We thereby ensured that our model would not read into the treaties more than has already been acknowledged, but at the same time we left the path open for a more progressive reading in the future.

On the other hand, one might still counter-argue that despite our minimalist approach towards setting basic rules, our model is still prone to paternalism and even oppression. Our doctrine essentially opens the door for to States to step in and potentially place basic rules of interaction within society as a whole. States might in the future wish to expand their powers even more so as to ensure that all humans will behave toward each other in a specific, pre-defined way.

In response to this, we would invoke the argument developed by relational theorists that all rights systems have an effect on how relationships are shaped. Even leaving relationships unregulated, as individualistic frameworks do, itself structures relationships. Oppression and paternalism, as we demonstrated, can thus also flow from a lack of interference within the human rights context. Ultimately, if we have to choose between two extremes, compared to a scheme that allows structural power imbalances to define the ways we enjoy human rights, we see less moral hazard in suggesting a human rights scheme in the horizon of which lies the vision of a caring and compassionate world.





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